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In The
SUPREME COURT OF THE UNITED STATES

No. 397

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,
Appellee, Respondent,

vs.

WILSHIRE OIL COMPANY OF TEXAS,
Appellant, Petitioner.

PETITION OF WILSHIRE OIL COMPANY OF TEXAS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES OF AMERICA,
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WILSHIRE OIL COMPANY OF TEXAS,
Appellant, Petitioner.

PETITION OF WILSHIRE OIL COMPANY OF TEXAS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Wilshire Oil Company of Texas, a Delaware corporation, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on the 24th day of March, 1970. A corrected opinion was filed April 23rd, 1970. Rehearing was denied the 16th day of June, 1970.

OPINIONS BELOW

This Petition seeks a review of the judgment of the Court of Appeals for the Tenth Circuit (Appendix page A1) which affirmed the judgment of the United States

District For the District of Kansas (Appendix page A2). The Court of Appeals decision has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was dated the 24th day of March, 1970. A corrected opinion was filed April 23rd, 1970. Rehearing was denied the 16th day of June, 1970. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1254(1).

QUESTION PRESENTED FOR REVIEW

1. Did the Appellate Court err in denying a judgment of acquittal based on the defense of double jeopardy in a Sherman Act prosecution in the United States District Court in Kansas where the defendant Wilshire entered a plea of nolo contendere in a similar case in the United States Court in Missouri?
2. Did the Appellate Court err in ruling that the indictment and the evidence were sufficient to allege or prove that defendant Wilshire knowingly joined a conspiracy, knowing of its existence and agreed to become a part of it, and with knowledge committed some act in furtherance thereof?
3. Did the Appellate Court err in ruling that the indictment and the evidence were sufficient to allege and prove a conspiracy in restraint of trade "in commerce?"
4. Did the Appellate Court err in overruling defendant's motion for a new trial based on prejudicial newspaper articles read by the jurors during the trial?

STATUTORY AND FEDERAL RULES INVOLVED

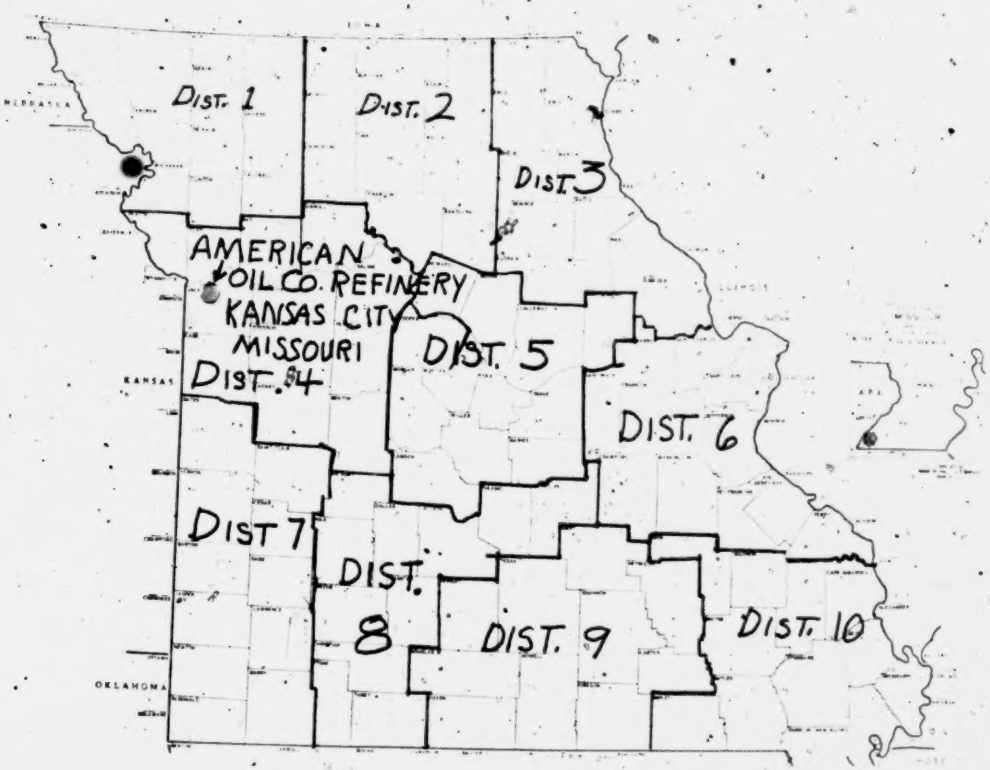
This Petition for Certiorari involves the prosecution of defendant Wilshire under Title 15, § 1 U.S.C.A., and Title 15 § 2.

STATEMENT OF FACTS

For Geographical background in the case a brief reference to maps of Kansas and Missouri will lend aid to a better understanding of the case.

Missouri is divided into ten districts for Highway Department affairs. There is only one refinery in Missouri at Kansas City, Missouri, which is owned and operated by American Oil Company (Standard).

The Missouri Map shows this:



Kansas is divided into six highway department divisions.

The oil company refineries are located as follows:

Phillips Petroleum Co., (Union Asphalt and Roadoils Inc.) Kansas City Kansas

American Petrofina Co., El Dorado, Kansas

Skelly Oil Co., El Dorado, Kansas

Socony-Mobil Oil Co., Inc., Augusta, Kansas

Apco Oil Co., Arkansas City, Kansas

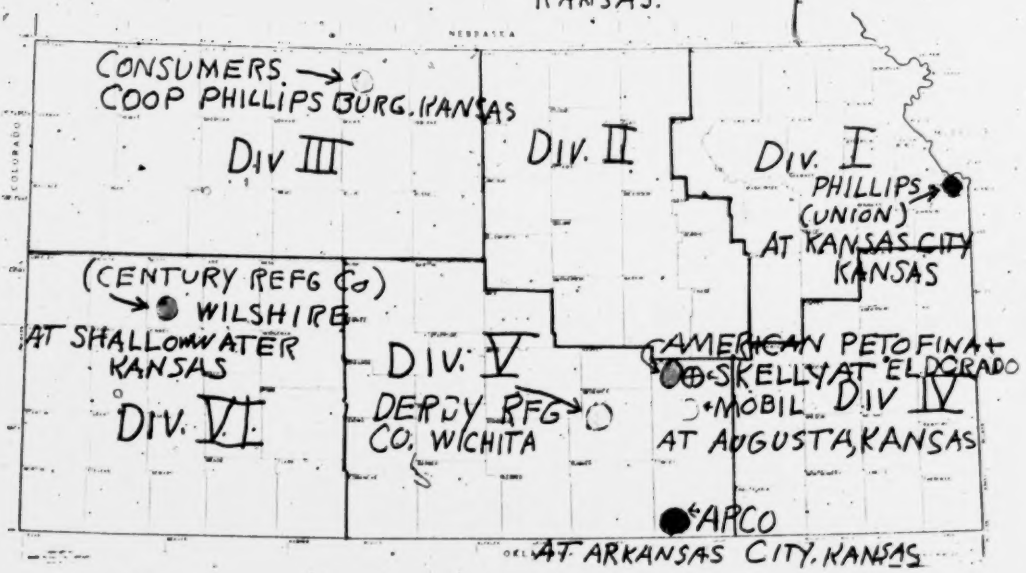
Derby Refining Co. (Colorado Oil and Gas Co.) Wichita, Kansas

Consumer's Cooperative Assn., Phillipsburg, Kansas

Wlishire Oil Co., (Century Refining Co. owned the Refinery) Shallow Water, Kansas

The Kansas map shows this division and the refinery locations:

HIGHWAY DIVISIONS AND REFINERY LOCATIONS KANSAS.



This is an action by the United States Government against Wilshire and other defendants for an anti-trust violation of the Sherman Act Title 15, § U.S.C. 1, for alleged price fixing in the sale of liquid asphalt to the State of Missouri. The action was brought in the United States District Court for the District of Kansas. The defendants besides Wilshire were:

Socony Mobil Oil Company, Inc.
Skelly Oil Company
The Consumers Cooperative Association
American Petrofina Company of Texas
Union Asphalts & Roadoils, Inc.
Colorado Oil and Gas Corporation
The American Oil Company
Apco Oil Corporation
Phillips Petroleum Company.

All of the defendants entered pleas not guilty, and later all of the defendants, except Wilshire, entered pleas of *nolo contendere* and received fines from $50,000 down to $25,000. Wilshire filed motions to dismiss the indictment based on the grounds of insufficiency of the indictment and upon the grounds of double jeopardy growing out of a previous conviction on a *nolo contendere* plea in the United States District Court for the Eastern District of Missouri, Eastern Division. These motions were overruled at a pretrial hearing without prejudice to the right of the defendant to renew same.

The Missouri prosecution was for an alleged conspiracy for fixing the price and allocating the territory and sales of roadoil or asphalt to the State of Missouri and in

United States District Court in Kansas the charge was based on fixing the price and allocating territory between companies in the sale of roadoil and asphalt to the State of Kansas.

Trial was had to the jury in September of 1967, resulting in a guilty verdict. Defendant Wilshire filed a motion for judgment notwithstanding the verdict and renewed its motion for judgment of acquittal and in the alternative for a new trial and also filed a motion to dismiss on the grounds of double jeopardy. These motions were taken under advisement and the Court finally overruled the motion for judgment of acquittal notwithstanding the verdict and motions for a new trial. On the issue of double jeopardy after a separate hearing the court overruled the motion for acquittal based on double jeopardy and fined the defendant $25,000 and costs of this action, from which decision an appeal was lodged in the United States Court of Appeals for the Tenth Circuit.

Wilshire Oil Company of Texas, a Delaware corporation, with its home office in New York and its operating office in Denver, Colorado, had never been involved in the sale of asphalt or road oils prior to 1961 and did not own or operate a refinery refining crude oil.

Riffe Petroleum Company, an Oklahoma corporation, was organized in early 1957. Its principal place of business was Tulsa, Oklahoma. L. E. Riffe was its president and managing officer. It engaged in the business of selling liquefied petroleum gas and liquid asphalt. In 1959 Riffe Petroleum Company, the Oklahoma corporation, contracted with Century Petroleum Company in Shallow Water, Kansas to be the broker of asphalt produced by Century Refining Company in its refinery in Scott County, Kan-

sas. In early 1960 Thomas W. Masterson who had previously sold asphalt for Union Asphalt and Roadoils Company out of Kansas City, Missouri and lived in Kansas City, Kansas, left Union in 1958 and became a salesman on his own, selling independently as Universal Asphalt Company. He was a broker in the State of Missouri for American Petrofina and Apco, Oil Companies producing asphalt in other Kansas refineries. L. E. Riffe hired Masterson in Kansas to be a part time salesman for Riffe Petroleum Company before its merger with Wilshire for the State of Kansas in 1960.

Riffe Petroleum Company, the Oklahoma corporation, merged with Wilshire Oil Company of Texas effective as of December 31, 1960 and Wilshire became the surviving Company. Wilshire Oil Company disposed of its Riffe Petroleum Company Division and the Riffe Petroleum Company assets effective August 9, 1963, after that time was no longer in the asphalt or road oil business in either Missouri or Kansas. Two years after it had disposed of its Riffe Division a grand jury investigation was commenced in the United States District Court in St. Louis, Missouri in 1965. A grand jury indictment was filed in the United States District Court in St. Louis, Missouri on July 22, 1965, indicting 18 oil companies engaged in selling liquid asphalt or road oil to the State of Missouri and 17 individuals. Of the companies Wilshire Oil Company of Texas was included. Also indicted was one O. Homer Riffe, Missouri salesman for Wilshire and brother of L. E. Riffe.

Pleas of *nolo contendere* were entered by all of the defendants, including Wilshire Oil Company of Texas and its representative, O. Homer Riffe. A fine of $10,000 was paid by Wilshire and $2,000 by Riffe.

In the Missouri grand jury proceeding witnesses were

subpoenaed and the duces tecum subpoena said, "The subpoena are shall mean and include the States of Missouri, Kansas and Iowa." Following the conclusion of the case is Missouri the documents subpoenaed in Missouri were by agreement submitted to a Federal Grand Jury that was later convened in the United States District Court for the District of Kansas at Kansas City, Missouri. Many of the oil company employees subpoenaed as witnesses in the Missouri Grand Jury proceedings were subpoenaed again in Kansas. It was stipulated at the post-trial double jeopardy hearing that witnesses who testified in the Missouri Federal Grand Jury testified about the situation in Kansas while before the grand jury. The indictment in Kansas named as defendants eight companies that sold liquid asphalt in both Missouri and Kansas, these companies were as follows:

American Oil Company (Standard Oil Company) Refinery located at Sugar Creek, Missouri

Union Asphalt and Roadoils, Inc. (Broker for Phillips Petroleum Company whose refinery was located in Kansas City, Kansas

Phillips Petroleum Company, Refinery located in Kansas City, Kansas

Socony-Mobil Oil Company, Refinery located in Augusta, Kansas

Skelly Oil Company, Refinery located at Augusta, Kansas

American Petrofina Company of Texas, Refinery located at El Dorado, Kansas

Apco Oil Company, Refinery located at Arkansas City, Kansas

Wilshire Oil Company of Texas (brokers for Century

Refining Company, Refinery located at Shallow Water, Kansas).

These companies also plead *nolo contendere* in Missouri and were fined.

These refineries or companies provided all of the asphalt for road maintenance sold in Kansas and almost half of such asphalt in the State of Missouri.

From the Missouri indictment at page 12 U.S.C.A., Appendix Volume I and the following pages, the Missouri system of bidding and allocation of territory in violation of the Sherman Act was for the salesmen for the various companies to meet in different places in Missouri and Kansas and Oklahoma, where in meetings they designated the low bidders for the sale of liquid asphalt to the State of Missouri for the Missouri maintenance letting. These low bidders were allocated delivery locations in each county for the sale of asphalt. A score sheet or bible was distributed containing agreed upon prices in each of the 114 Missouri counties and the salesmen agreed that the low bidder would bid below the agreed upon prices and where it was not to be the low bidder would bid above such agreed upon price.

From the Kansas indictment, page 1, U.S.C.A., Appendix Volume I, and the following pages, the Kansas system of bidding and allocation of territory was for the representatives of the defendant companies to meet in various Kansas cities and in other cities and there designate the low bidders for the sale of liquid asphalt to the State of Kansas, allocating among themselves delivery locations and agreeing upon f.o.b. prices. It was agreed that each defendant would bid below the agreed upon f.o.b. price

and freight rates for the sales on which it was to be the low bidder and each defendant would bid the agreed upon f.o.b. price and freight rate above for sales on which it had agreed not to be the low bidder. Common freight rates were distributed among the defendants to be used in bidding to each of the 400 delivery locations in the State of Kansas.

From the evidence we find that for highway maintenance purposes the State of Kansas is divided into six divisions and the State of Missouri is divided into ten districts. (See Exhibits A, J-2, and X-1) (Vol. III Exhibits—10th C.A. Appendix). Two refineries and two companies that are indicted in Kansas were not indicted in Missouri. Consumers Coop (later known as Farmland) had a refinery at Phillipsburg, Kansas, and Colorado Oil and Gas Corporation (formerly Derby) had a refinery at Wichita, Kansas. There was only one refinery located in the State of Missouri which was not an oil producing State and this was American Oil Company (Standard) located at Kansas City, Missouri.

The evidence reveals that Kansas City, Kansas and Kansas City, Missouri comprise one trade area. The United States Government through the Interstate Commerce Commission treats a portion of the Kansas City Trade area as one zone including Kansas City, Missouri and Kansas City, Kansas within the meaning of Section 203-B-8 of the Interstate Commerce Act, see 288 Motor Carrier Cases ICC Commission Case No. MCC258. (Exhibits X-2 and X-3, Vol. 3, Exhibits, 10th C.A. Appendix.)

The Kansas City refinery price as agreed upon in this heart of America area for MC asphalt was 8¼ cents a gallon, principally for the years 1962 established prin-

cipally by American Oil Company (Standard) on the Missouri side and Phillips Petroleum Company (Union Asphalt) on the Kansas City, Kansas side.

How the bidding operated in the State of Kansas is illustrated by two years about which there was testimony, 1961 and 1963.

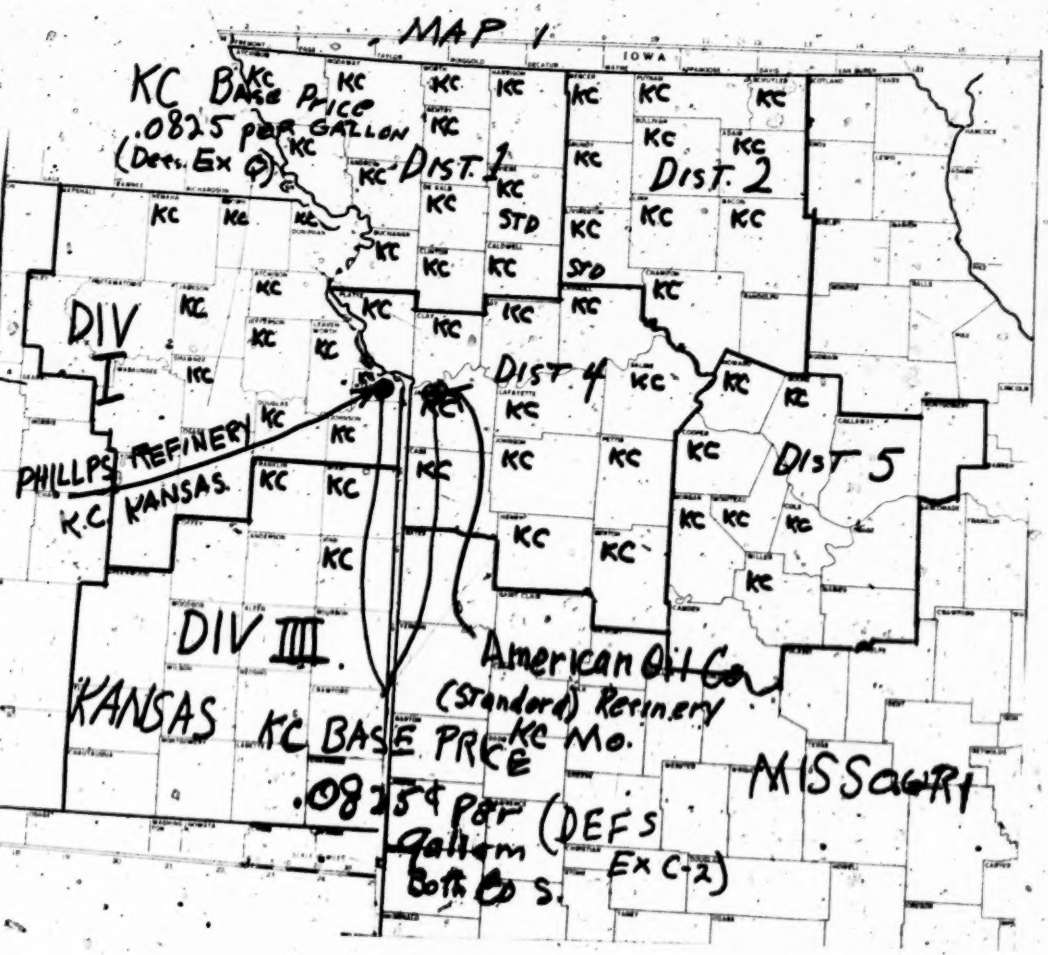
From the testimony of Warren Smith, 10th C.A. Appendix, Voume II, page 305, we find that in January of 1961 he met Mr. Patch of Union at the Muehlbach Hotel in Kansas City, Missouri, at a convention, and went to the Phillips Hotel to a room where Mr. Dave Wasser of Derby (Colorado Oil & Gas Company) discussed the Kansas maintenance letting. Freight rate changes for the freight in Kansas City were discussed by Mr. Wasser, and they obtained the freight rates from the base point of El Dorado, Kansas. Then later Mance of Standard and Patch of Union and Warren Smith of Union met in Union's office in Kansas City. They then divided up over .30 delivery points in Divisions 1 and 4 in the Kansas maintenance letting and agreed to use a base price of 8¼ cents f.o.b. refinery and Kansas City freight to the delivery point in determining their bids agreeing who was to be the low bidder. These delivery points were only in Divisions 1 and 4 in Eastern Kansas, as neither of these refineries bid anywhere else in the State of Kansas. Later at a meeting in the Broadview Hotel at Wichita, Kansas, later in January of 1961, the various representatives of the oil companies met and allocated delivery points in the State of Kansas. Standard and Union did not bid in the other four divisions in Kansas and Consumers Co-op and Wilshire only bid in Divisions 3 and 6 in the extreme western part of Kansas.

James Adamson of Phillips Petroleum Company tes-

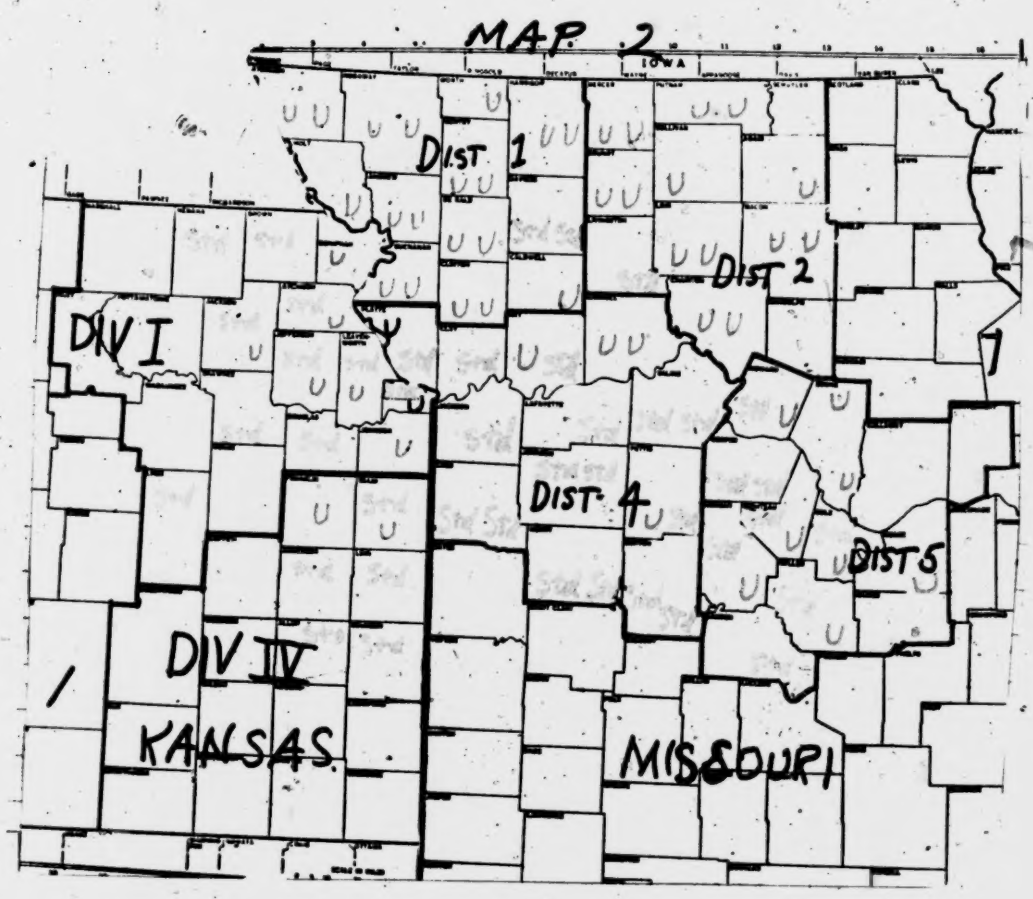
tified that in 1963 (see U.S.C.A. Record Volume II, page 204 *et seq.*) that Adamson and Mance of Standard agreed to use the base price of Kansas City posting of both refineries, Standard and Phillips, and the interstate tariff as a yardstick from the Sugar Creek refinery of American Oil Co. in Missouri to points in Division 1 and 4 in Kansas, coming up with a common set of prices in their division and allocation of territory in Kansas. Adamson, later in the Broadview Hotel, Wichita, Kansas meeting states he took the information to the meeting as to the division of points between Adamson and Mance, and told the Kansas suppliers that Phillips and Standard were going to use the base price at Kansas City and spelled it out what that price was. The base price was the Kansas City base price of 8¼ cents and the Interstate Commerce Commission freight in determining their bids.

Further to show the evidence of a common price and a common trade area and one conspiracy in Kansas and Missouri, we refer to Defendant's Exhibit D-2, (Vol. II Exhibits) which was the Missouri "Bible" for 1962 and compare it with Defendant's Exhibit C-2 (Vol. II of Exhibits) which was the 1962 Kansas maintenance bid sheet. The points in this territory are awarded principally to either Union, Phillips or Standard and both the Missouri and Kansas side carry an almost uniform price of 8¼ cents per gallon plus freight. From the exhibits we have compiled the following analysis:

The relation between the two states can readily be observed by reference to the two following combination maps of Missouri and Kansas.



Map 2 shows low bidders in Kansas and Missouri as between Union (Phillips) and Standard (American Oil Co.—bids are both shown) in Missouri.



These show a division of points principally between Standard and Union (Phillips) in the Kansas City trade area. The facts and the testimony point to the following:

1. The price in the Missouri-Kansas area of asphalt was the same, namely, 8¼ cents a gallon.

2. The delivered price was approximately the same, as a study of the Kansas and Missouri successful bids will reveal.

3. The price range in the unsuccessful bids was the same in both states.

4. The source of supply was the same in both states in the area surrounding the Eastern third of Kansas and the Western half of Missouri.

5. The two so-called conspiracies in Kansas and Missouri were tied together and there was a substantial interrelationship between the two conspiracies. The two refineries that straddle the Missouri boundary line at Kansas City control the prices in areas stretching over 100 miles in all directions around Kansas City. The facts show that there was a common price and a common freight rate for the companies bidding in the Kansas City area using the Kansas City refinery price of American (Standard) and Union (Phillips) and an interstate tariff insofar as the division of points between Union and Standard was concerned. Divisions 1 and 4 in Kansas and the adjacent districts to Kansas City in the State of Missouri being Districts 1, 4 and 7 had a common price of MC asphalt of 8¼ cents per gallon in 1961, 1962 and 1963. The prices were established by the two companies, Standard on the Missouri side and Phillips or Union on the Kansas side and the surrounding territory was carved up by agreement and this agreement was both to fix the prices and

to allocate the territories. In addition, Adamson, on cross-examination (10th C.A. App. Vol. II p. 264) testified telling counsel for Wilshire in an interview the following:

> "Nothing specific except that in general it was understood that the suppliers in Kansas were possibly restricting their bids in Missouri in consideration of the fact that they would be permitted a greater share of the Kansas volume available by so doing."

The conspiracy apparently was loose in both states because there is evidence (App. Vol. II, p. 292) where the Standard representative took points assigned to Skelly at the Kansas agreement and did it in retaliation of Skelly taking points in Montgomery County, Missouri, assigned to Standard in the Missouri conspiracy and later there was testimony that there was an exchange agreement whereby Skelly supplied Standard's points in Kansas and Standard supplied Skelly's points in Missouri.

1. DID THE APPELLATE COURT ERR IN DENYING A JUDGMENT OF ACQUITTAL BASED ON THE DEFENSE OF DOUBLE JEOPARDY IN A SHERMAN ACT PROSECUTION IN THE UNITED STATES DISTRICT COURT IN KANSAS WHERE THE DEFENDANT WILSHIRE ENTERED A PLEA OF NOLO CONTENDERE IN A SIMILAR CASE IN THE UNITED STATES COURT IN MISSOURI?

The plea and proof of double jeopardy is a good defense as it appears by an analysis of the Complaints that there are common factual issues to both cases which are admitted by the Motion to Dismiss.

1. *The Defendants*

(a) Eight of the ten defendants named in the Kansas

indictment had been named as defendants in the Missouri indictment. They are:

The American Oil Company

Socony Mobil Oil Company

Skelly Oil Company

American Petrofina Company of Texas

Union Asphalts & Roadoils, Inc.

Phillips Petroleum Company

Apco Oil Company

Wilshire Oil Company of Texas.

All of the companies named as defendants in the Kansas indictment are named as defendants in the Missouri indictment except two, The Consumers Co-Operative Association and The Colorado Oil & Gas Corporation.

2. *The Product*

The product which is the subject matter — "Liquid Asphalt" is defined in each indictment in identical language and then states that it is used in the maintenance and repair of highways.

We find the nature of trade and commerce set out in both indictments.

MISSOURI INDICTMENT

IV. *Nature of Trade and Commerce*

"8. Many states, including the state of Missouri, buy and use substantial quantities of liquid asphalt for the maintenance of certain types of roads and highways which commonly are referred to as 'black top

roads.' For this purpose the state of Missouri annually uses substantial quantities of liquid asphalt."

Inasmuch as the words "other states" appear throughout the indictment, we must argue that other states includes Kansas.

KANSAS INDICTMENT

IV. *Nature of Trade and Commerce*

"6. Many states, including the State of Kansas, buy and use substantial quantities of liquid asphalt for the maintenance of certain types of roads and highways which commonly are referred to as 'blacktop roads.' For this purpose the State of Kansas annually uses substantial quantities of liquid asphalt."

The use of the language "many states" in the Kansas indictment would, of course, include Missouri.

The nature of the trade and commerce are set out in both indictments is that "many states" buy and use asphalt for the maintenance of roadways.

We find paragraph V in the Kansas Indictment reads as follows:

OFFENSE CHARGED

"12. Beginning sometime prior to 1959 and continuing thereafter through at least 1965 the exact dates being to the grand jurors unknown, the defendants and co-conspirators entered into and engaged in a combination and conspiracy and unreasonable restraint of the hereinbefore described interstate trade (*many states buying and using substantial quantities of liquid asphalt which would include both Missouri and Kansas*) and commerce in liquid asphalt in violation of Section 1 of the Act of Congress of July 2,

1890, 15 U.S.C. 1, commonly known as the Sherman Act."

We assert that the Kansas indictment includes in its Nature of Trade and Commerce paragraph and Offense charged paragraph the State of Missouri, particularly where it says "hereinbefore described interstate trade" which includes the trading and buying by many states.

The offense charged in the Kansas indictment does not limit the hereinbefore described interstate trade to the State of Kansas.

The time period of the conspiracy alleged overlaps. In the Kansas indictment — beginning sometime prior to 1959 and continuing thereafter through at least 1965— and in the Misscuri indictment it is verbatim except that it reads * * * prior to 1960 and continuing thereafter through at least 1963. Each indictment states that the defendants met at the places named and had conversations at hotels, motels, restaurants, clubs, offices, and other places where they did the things alleged. The Missouri designation of places was at St. Louis, Clayton, Jefferson City, Kansas City in Missouri, Tulsa, Oklahoma, and other cities. The Kansas designation of places was Kansas City, Topeka, Salina, and Wichita, Kansas, and in other cities.

Both of the indictments conclude in paragraph XVIII with "The combination and conspiracy alleged in this indictment was entered into in part and has been carried out in part within the Eastern District of Missouri," and

Paragraph XVII of the Kansas Indictment reads:

"The combination and conspiracy alleged in this Indictment has been carried out in part within the District of Kansas."

In addition we wish to point out two more items attached in the certiorari Appendix, being certified copies of the Complaint in the United States District Kansas in Civil Action KC 2487, United States of America, plaintiff v. Socony Mobil, *et al.*, not including Wilshire, it having ceased doing business in Kansas in 1963. The suit seeks an injunction to restrain the defendants from fixing the price of asphalt and it was a companion case to the antitrust prosecution of all of the companies. We have appended the complaint and the stipulation of the counsel and also the consent decree. (Appendix IV and V) We point out that the government in the injunction case in its prayer for relief treated the arrangement as a multi-state conspiracy for the reason in the prayer for relief it said:

> "Wherefore plaintiff prays: * * * That each defendant etc. * * * be perpetually enjoined and restrained from continuing, maintaining or renewing directly or indirectly any combination or conspiracy hereinbefore alleged or from engaging in other combination or conspiracy having a similar purpose or affect or from adopting or following any practice, plan, program or device having a similar purpose or effect IN THE SALE OF LIQUID ASPHALT TO ANY CUSTOMER IN THE UNITED STATES."

In the consent decree in the definitions in paragraph 2 (c) it is said:

> "The mid-continent area shall mean the states of Montana, North Dakota, South Dakota, Wisconsin, Minnesota, Iowa, Nebraska, *Kansas, Missouri*, Arkansas and Oklahoma."

The enjoining part paragraph 6 says:

> "For a period of five years following the date of entry of this final judgment each defendant is ordered and directed to furnish simultaneously with each

sealed bid and each sealed quotation for the sale of liquid asphalt submitted by it to *any federal, state or local agencies* or any other government awarding authorities in the mid-continent area of the United States an affidavit."

The decree of the Court apparently restrained a multi-state conspiracy.

As background for our argument that the plea of double jeopardy is a good defense, we refer to several preliminary cases. It is fundamental that the Government cannot fragment a single conspiracy. There are a number of cases where fragmentation of a single conspiracy was unsuccessfully attempted.

One of the leading cases is *United States v. Cohen*, 197 F.2d 26 (3 Cir., 1952). In this case one of the defendants, Wright, was tried twice for violation of the conspiracy laws pertaining to narcotics. He was tried in New York and convicted for participation in the New York area. In a second case in the United States Courts in New Jersey he was charged with the same type of offense. The Court of Appeals held his plea of double jeopardy was good, stating that a single conspiracy cannot be split up for the purpose of prosecution. Other cases where fragmentation of a single conspiracy was unsuccessfully attempted are the following: *Manning v. United States*, 275 F. 29 (8th Cir. 1921); *Powe v. United States*, 11 F. 2d 598 (5 Cir., 1926); *United States v. National Cheese Institute*, Criminal No. 33197, N. D. Ill., 1950; *United States v. United States Gypsum Co.*, 51 F. Supp. 613.

Wilshire relies principally upon three very recent cases known as the "Honda cases." These are *United States of America v. American Honda Motor Co.*, (U.S.D.C. N.D.

September 1, 1967) 271 F. Supp. 979; *United States of America v. American Honda Motor Co.*, (U.S.D.C. N.D. Ill. E.D.) 273 F. Supp. 810; and *United States of America v. American Honda Motor Co.*, (U.S.D.C. S.D. E.D.) 289 F. Supp. 277 (October 3, 1968).

An analysis of the three Honda cases, two in California and one in Illinois, follows:

U. S. v. American Honda Co., Inc., et al., No. 35909, U. S. D. C. So. Dist. California, filed March 15, 1966	U. S. v. American Honda Co., Inc., et al., No. 40956, U. S. D. C. No. Dist. California So. Div., filed August 3, 1966, 271 F Supp 779	U. S. v. American Honda Inc., et al. No. Dist. Illinois Eastern Div., filed September 21, 1966, 275 F Supp 810
DEFENDANTS		
AMERICAN HONDA MOTOR CO., INC.	AMERICAN HONDA MOTOR CO., INC.	AMERICAN HONDA MOTOR CO., INC.
Honda Dealers Association of Southern California	Bay Area Honda Dealers Assn.	Chicago Area Honda Dealers Assn.
John C. McCormack AH	Joseph A. Quaid AH	Tom Cates AH
Kiyohiko Okumoto AH	T. C. Browne AH	Robert R. Shaw A
Paul J. Collins A	Clifford G. Schmillen AH	James Leo A
Stephen A. Fordvee A	Gary Jones AH	Gale T. Johnson A
William A. Krause A	Charles N. Miller A	Basil Proskia A
Charles E. Scott A	Gayse L. Nelson A	
	Edward Correa A	
AH—Sales Managers or District Managers of Honda		
A—Officers of Local Area Association		
OFFENSE CHARGED		
Restraint of trade or commerce in Honda Motorcycles, etc., in the GREATER LOS ANGELES AREA	Restraint of trade or commerce in Honda Motorcycles, etc., in the SAN FRANCISCO BAY AREA	Restraint of trade or commerce in Honda Motorcycles in the CHICAGO area
Price fixing of Hondas in the Los Angeles area	Price fixing of Hondas in the San Francisco area	Price fixing of Hondas in the Chicago area
TIME PERIOD		
January 1963 to sometime in 1965	August 1961 until sometime in 1965	About March 1963 until sometime in 1965
PLACE		
GREATER LOS ANGELES AREA	SAN FRANCISCO BAY AREA	CHICAGO AREA
PRODUCTS		
Honda Motorcycles Parts and accessories	Honda Motorcycles, parts and accessories	Honda Motorcycles parts and accessories
STATUTE		
Section 1, Sherman Act	Section 1, Sherman Act	Section 1, Sherman Act
TRADE AND COMMERCE		
Flow of Hondas to destinations in the United States, including the GREATER LOS ANGELES AREA	Flow of Hondas to destinations in the United States, INCLUDING THE SAN FRANCISCO BAY AREA	Flow of Hondas to destinations in the United States, INCLUDING THE CHICAGO AREA
EFFECTS		
Prices fixed in the GREATER LOS ANGELES AREA	Same in SAN FRANCISCO BAY AREA	Same in CHICAGO AREA
Competition suppressed in the GREATER LOS ANGELES AREA	Same in SAN FRANCISCO BAY AREA	Same in CHICAGO AREA
Customer deprived of competitive prices in the GREATER LOS ANGELES AREA	Same in SAN FRANCISCO BAY AREA	Same in CHICAGO AREA

The Ohio case was determined and decided October 3, 1968, and appears at 289 F. Supp. 277 and is similar to three cases set forth above with the exception that the offense charged is restraint of trade and price fixing of Hondas in the Ohio area. The place is the Ohio area. The effects were that prices were fixed in the Ohio area, competition suppressed in the Ohio area, and customers deprived of competitive prices in the Ohio area.

In the case of *Los Angeles* Honda plead *nolo contendere* and was fined $10,000. In the *San Francisco* case it filed a motion to dismiss on the question of double jeopardy, and the trial judge, Judge Swigart, in his opinion finds that the defense of double jeopardy was good and also there was a lack of due process and continued harassment in the proceedings.

From the record in the *San Francisco* Honda case we find from an affidavit of one of the counsel a history of how the cases arose, that subpoenaes were issued by a Grand Jury in Los Angeles and documents were subpoenaed from all over the United States from dealers' associations and dealers in New Jersey, Illinois, Florida, Georgia, Michigan, Ohio, Washington, Montana, Oregon, Idaho and New England. This was similar to the government's actions as in our instant case where in the Missouri Grand Jury proceeding documents are subpoenaed covering both Kansas and Missouri and witnesses were interrogated in the Missouri Grand Jury regarding affairs in Kansas.

The Government contended that in each area, as in the instant case, the defendants and co-conspirators were concerned only with the retail prices in the Chicago area or the Los Angeles area or in the San Francisco area or in

the Ohio area and not anywhere else. In other words, Honda dealers in these separate and different market areas did not compete with each other.

The Government contended that a cursory examination of the four indictments shows that each alleges a conspiracy limited to the fixing of retail prices in a particular geographical area and these geographical areas are widely separate from each other and all the defendants except American Honda are different in each case. The Government, as in our instant case, claims there were four separate price fixing conspiracies and the only common ground was that American Honda was involved. All three Federal judges in each of the three cases felt there was one conspiracy and that the Government could not fragment and uphold the defense of double jeopardy.

Each of the Honda cases was appealed, except the Ohio case, to the Supreme Court of the United States and either on stipulation or motion of the defendant the appeals were dismissed. In Honda the Government contended and it is a fact, that the market areas were separate. In our case the areas are much closer together. The Kansas refineries by and large supplied most of Missouri, as well as Kansas. The price range was the same, around ten cents a gallon delivered in both states. Companies doing business both in Kansas and Missouri according to the complaints and the proof were conspiring to fix the prices in the Kansas City area, regardless of whether it was in Kansas or Missouri, and, as was pointed out in the Honda cases, Honda was interested in maintaining a price throughout the United States. We find the refiners in the Kansas City area on both sides of the Missouri Kansas boundary, as well as the refineries throughout Kansas, were inter-

ested in a common price in the Heart-of-America area, particularly, and also throughout the State of Missouri and worked together in both states to fix the price of MC asphalt at a uniform delivered price, as we have pointed out, of around ten cents per gallon.

KOONTZ CASE

One of the cases cited in the Honda cases is the case of *United States v. H. E. Koontz Creamery, Inc.*, (U.S.D.C. D. of Maryand, 1966) 257 F. Supp. 295. In this case the United States District Judge, Watkins, sustained a plea of double jeopardy.

In the two *Koontz* cases there were common defendants with one exception. The area was practically the same, although there was an overlap in area. The product in the first case was milk sold to schools. The product in the second case was milk sold to the general public. The prices were not the same. The defendants were previously fined on a plea of *nolo contendere* for conspiracy to allocate school milk contracts. Thereafter, the defendants were again indicted for conspiracy to fix prices at which milk products could be sold to regular retail and wholesale trade. In the opinion the Court says:

> "The court however, upon the entire record, finds with our hesitation that during all the times in question there existed an *arrangement and agreement with respect to the maintenance of non-competitive milk prices in the Baltimore Metropolitan area. The type of milk distribution—street, school, jugs—were all parts or aspects, or factors of, and inextricably parts of, this overall design.* It may be true that the course of a conspiracy, like that of true love, may not always run smoothly, and may be marked by 'family squab-

bles.' Here, although the individual participants were not serfs, the overall purpose under aegis of MDA (association) was continuous. * * * *The single purpose—non-competitive milk prices in the Baltimore Metropolitan area*—was continuous and pervasive; and the various agreements as to street, school and jug prices were merely devices or means to effect the overall end." (Emphasis partially added)

Investigation reveals that this case was not appealed by the Government. Pointing out the rule of this case to our case at bar, the single purpose of the present Missouri and Kansas cases was to establish non-competitive prices in the Kansas City area and spread them in both directions in Kansas and Missouri.

CORN PRODUCTS CASE

Another important case upon which we rely is the case of *United States v. Corn Products.* This case was decided by the Southern District of California and is Case No. Criminal 30937. It was decided in 1962. It has not been published in the Federal Reporter System but this does not detract from its value.

There were two indictments—one in the *Armour* case and the other in the *Corn Products* case—both returned by the same Grand Jury on the same day. Both indictments resulted from a single Grand Jury investigation of industrial facts and oil industry in the western states.

In the *Corn Products* case the charge was for monopoly and price fixing in the sale of shortening which was made from crude vegetable oil obtained primarily from cottonseed and soy beans. In the *Armour* indictment the charge was conspiracy and price fixing in the sale of salad

oil produced by refining crude vegetable oil obtained primarily from cottonseed and soy beans. There were different products but the same customers.

The *Armour* case was tried first and the defendants won a trial to a jury and then plead double jeopardy in the second case, the *Corn Products* case. The Court in his opinion in a special finding of fact says:

> "The records in the two cases demonstrate a product over-lap which impairs the validity of the product differentiation by which the government seeks to distinguish the two cases. Considerable evidence in the Armour case related to salad oil. The price lists on which the government relies is proof of conspiracy in this Corn Products case to establish prices for liquid shortening as well as salad oil. The pricing of liquid shortening was within the scope of and was liquidated in the Armour trial."

The Court further said in one of its conclusions, after finding that the combination and continuing agreement was the same combination in each case:

> "The central core and the basic facts of the offenses charged in the two cases were and are the some. The two cases were and are so related, and the issues and facts were and are so intermingled and intertwined that the Judgment of Acquittal in the Armour case was a determination adverse to the government on the issue of conspiracy essential to the proof of the offense charged in this case."

A fact at this point which we cannot overlook is that in the case at bar the evidence reveals that a portion of the overt acts of the conspiracy were carried out in the Kansas conspiracy in part in Missouri. This can be found in the allegations in the Complaint in the last paragraph, as well as the various meetings of Mance and Adamson and

others in Missouri in discussing the Kansas conspiracy.

It is well settled that where an overt act is committed in one jurisdiction, all of the alleged conspirators, which would include all of the Kansas people, could have been tried in the State of Missouri in the Missouri case.

Going back to the *Corn Products* case and applying the reasoning of the Court on the overlapping of the products and price list, we find by analogy an overlapping agreement in the Kansas City Heart-of-America area between the Phillips and Standard refinery on the same price structure and this pricing was within the scope of the litigation in the Missouri case, because it took place in Missouri and it was a fact situation mutual to both cases, as well as permeated the whole price structure in the two states. We find Mance and Adamson sitting in Kansas City, Missouri, using .0825¢ per gallon base point refinery price and using the interstate commerce freight for Kansas City to the point in Kansas as a measuring yard for price fixing and division of territory between the two refineries. By reference to defendant's Exhibit D-2 (10th C.A. Appendix Vol. III, Exhibits) on the double jeopardy hearing, which is the Missouri bidding sheet and the Missouri tabulation of bids, and that allegation in the indictment that the refineries adopted the over-under bidding system, we have the same thing happening in Missouri which creates a measuring stick for price fixing and division of territory between the two refineries in both states, which spreads to the other Kansas refineries selling into Missouri.

Adamson then took this agreement to Wichita where the other companies were told of the arrangement. There was an overlap in the pricing arrangement, as in the

Corn Products case, much closer together than the geographical area sought to be established by the Government in the Honda cases heretofore referred to. We submit that this Kansas City trade area pricing and territorial division in this area permeates the entire Kansas-Missouri area making it a situation where a pricing overlap involves both sides of the Missouri-Kansas boundary, making it a common course of action and one conspiracy. In this connection, the Government relied on the price fixing and territorial arrangement and agreement between Phillips (Union) and American Oil Company (Standard) in the Kansas City area and the subsequent shipments from the Sugar Creek (Missouri) refinery of Standard of the asphalt produced in Missouri into Kansas to established the interstate commerce proof necessary to establish its "in commerce" interstate commerce theory and such an operation was "in commerce" and a jury found the facts that the shipments were "in commerce" from the Standard refinery in Missouri to Kansas, although Wilshire never agreed to give "over and under" bids in Division 1 and 4 in Eastern Kansas or in 2 and 5 in Central Kansas and was quite insulated from the Phillips-Standard agreement as to price and territory and argued against it being "in commerce."

The Government now executes an about face and contends there is an insulating wall down the Missouri-Kansas boundary. It is Wilshire's contention that the pricing and territorial arrangement in the Kansas City area spreads in both directions and creates and builds one conspiracy. The Government cannot cross the bridge between Kansas City, Kansas, and Kansas City, Missouri, to establish an interstate commerce conspiracy and deny

Wilshire's right to cross the bridge to establish a defense of double jeopardy.

The fact that the areas are different is unimportant, see *Powe v. United States*, 11 F. 2d 598, Fifth Circuit, 1926. An analysis of the first charge and the later charge which was held to be double jeopardy herewith follows. The pertinent syllabus is as follows:

> "4. Criminal law—Defendant held to have been put in jeopardy under former indictment, though it referred to liquor sales in certain city, while present indictment referred to sales anywhere in district in which such city was located (National Prohibition Act, tit. 2 [Comp. St. Ann. Supp. 1923, § 10138½ et seq.])"

In the Opinion the Court says:

> "The government cannot split up one conspiracy and make several conspiracies out of it."

The *Powe* opinion cites *In re Snow*, 7 S. Ct. 556, 120 U. S. 274, 30 L. ed. 658. In this case the defendant cohabitated with seven women as his wives. He was charged for cohabiting through different time periods. The Supreme Court of the United States held one offense.

> "A grand jury cannot divide a continuous offense, arising under said Act of 1882, into arbitrary parts, call each part a separate offense, and find separate indictments therefor."

We cited previously *United States v. Cohen*, 197 F. 2d 26, (C.C.A. 3rd).

The principle against double jeopardy is set forth in *U. S. v. Mazzochi*, 75 F. 2d 497, (2nd Cir. 1935).

The difference between the two cases was in one case there was an attempted sale under a conspiracy statute of heroin and in the other case there was an attempted sale

of opium. In this case as in our case at bar there were two different customers. In the heroin case there was an attempted sale to one customer and in the opium case there was an attempted sale to two other persons. We fail to see the difference between a conspiracy to sell from the Kansas City area at fixed base price of 8¼ cents a gallon to Missouri and sale at the same price to a different customer, towit: the State of Kansas.

In *Braverman v. United States*, 317 U. S. 49, 63 S. Ct. 99 and 87 L. Ed. 23, the court in its opinion says:

> "for when a single agreement to commit one or more substantive crimes is evidenced by an overt act, as the statute requires, the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects. Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.
>
> * * *
>
> "The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute, § 37 of the Criminal Code. For such a violation only the single penalty prescribed by the statute can be imposed."

2. DID THE APPELLATE COURT ERR IN RULING THAT THE INDICTMENT AND THE EVIDENCE WERE SUFFICIENT TO ALLEGE OR PROVE THAT DEFENDANT WILSHIRE KNOWINGLY JOINED A CONSPIRACY, KNOWING OF ITS EXISTENCE AND

AGREED TO BECOME A PART OF IT, AND WITH KNOWLEDGE COMMITTED SOME ACT IN FURTHERANCE THEREOF?

The law is clear that "a person does not become liable as a conspirator unless he knows of the existence of a conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance of it." *Jones v. United States*, Tenth Circuit, 1958, 251 F. 2d 28, certiorari denied, 78 S. Ct. 703. In addition to *Jones v. U. S.* the following cases support our position.

United States of America v. Salvatore Falcone, 311 U. S. 205, 85 L. Ed. 128. The second syllabus is applicable:

> "The gist of the offense of criminal conspiracy as defined by § 37 of the Criminal Code (18 U.S.C. § 88), is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy, and *persons having no knowledge of the conspiracy are not conspirators.*"

Knowledge of a conspiracy was held vital in the case *Ingram v. United States*, 360 U. S. 672, 3 L. ed. 2d 1503, 79 S. Ct. 1314, 1959, where the Court in the 12th syllabus says:

> "To establish the intent requisite to a conviction of conspiracy, the evidence of knowledge of the unlawfulness of the purpose of the conspiracy must be clear, not equivocal."

Ingram has been cited and quoted by the Tenth Circuit, see *Dennis v. United States*, C.A. 10, 1962, 302 F. 2d 5.

> "Without knowledge, intent to participate in an established conspiracy cannot exist.
>
> "To establish intent, in conspiracy prosecution, evidence of knowledge must be clear and not equivocal."

See also:

Maracante v. United States, C.C.A. 10, 1944, 49 F. 2d 156;

VanHuss v. United States, C.C.A. 10, 1952, 197 F. 2d 120;

Duke v. United States of America, C.C.A. 5, 1956, 233 F. 2d 897;

Call v. United States of America, C.C.A. 5, 1959, 265 F. 2d 167;

Miller v. United States, C.A. 9, 1967, 382 F. 2d 583:

"In order to establish person as a participant in a conspiracy, the evidence must show that accused intended to join and cooperate in the illegal venture. "Knowledge that conspiracy exists is minimum requirement for establishing requisite intent to conspire, and to establish intent, evidence of knowledge must be clear and not equivocal."

United States v. Rappaport, C.A. 3, 1961, 292 F. 2d 261.

In applying the law to the facts, we find that the Court in its opinion in the case at bar is in error as the Court makes an erroneous assertion that is not based on any facts and is directly contrary to the facts.

At page 8 the court says in its Opinion in referring to Masterson, that "The agent attended the 1960 meeting of asphalt salesmen when the 'points' were divided up and was successful in getting only nine of them in a single western Kansas division." This is incorrect. The 1960 asphalt maintenance bids were due by December 2, 1959, see Government Exhibit 7, in the file of Exhibits in the Office of the Court Clerk of the Tenth Circuit, this exhibit was not reproduced. The bid notice was sent out by the State of Kansas and says:

> "Notice is given that sealed proposals for the furnishing of bituminous materials, etc., will be received by the Director of Purchasers, State of Kansas—until 2:00 P. M. December 29, 1959."

An examination of this exhibit, Riffe Petroleum Company's bid, shows that it was signed on November 30, 1959. Obviously any meeting between the asphalt salesmen to allocate territories and fix prices would have to have been had prior to November 30, 1959. Masterson was not employed by Riffe Petroleum Company until after January of 1960 and so it would have been impossible for him to have attended any meeting where the 1960 delivery points were divided up and there is no evidence that he did so. There were no more meetings to allocate territory and fix prices for Kansas maintenance asphalt until early January 1961 when prior to January 10, 1961 Masterson attended the Wichita meetings.

At page 10 the Court says:

> "And we believe the ticklish problem of pre-merger knowledge must be decided against Wilshire on the facts. Although appellant claims to have unwittingly bought into an on-going conspiracy and for that reason it ought to be excused, the totality of the evidence supports the conclusion that Wilshire had ample opportunity to detect and reject the illegal practices."

The Court has said that Wilshire could have investigated. Wilshire had no personnel in Oklahoma except those in the Riffe Division. It had operating personnel for its oil and gas operations in Denver, Colorado and its management office was in the office of Reed and Crane, attorneys in New York City. Its efforts to begin an audit met with frustration shortly after the merger.

Testimony of a Wilshire Vice President reveals that after the merger Wilshire auditors were refused access to the books of Riffe division until Riffe was made executive Vice President of Wilshire on the 27th of January, 1961. (C.A. App. Vol. II, p. 393).

It was not until after the 27th of January, 1961, after Masterson had met the Kansas asphalt salesmen at Wichita that Wilshire's auditors could even get in the door to audit the Riffe books and by that time the Riffe Division was already in the alleged conspiracy.

It is also our position that an investigation would have availed Wilshire nothing in view of the wars between Wilshire and its Riffe Division resulting in the two *Wilshire v. Riffe*, 381 F. 2d 646, and *Wilshire v. Riffe*, 406 F. 2d 1061. A reference to the transcripts and records in those two cases will reveal that it required extensive discovery depositions and it was not until 1965 that Wilshire discovered that its Kansas salesman had his own company and was representing competing companies selling asphalt in the State of Missouri.

Masterson, if he gained any knowledge of conspiracy before January 1, 1961 was not acting in the scope of Wilshire's employment prior to the merger. The Court's Opinion seems to suggest that Masterson gained his knowledge while acting in the scope of his employment with Wilshire.

Judge Hill states in his Opinion that Wilshire had ample opportunity to detect and reject the illegal practices. This taxes our credulity—what opportunity? There were no conspiratorial activities until after the merger. January 1, 1961, was a Sunday, January 2nd was a New Year's Holiday Monday. The bid of Riffe Division of Wil-

shire was signed in Tulsa on January 10, 1961, Government Exhibit 8.

In the interim of 7 days from the 3rd of January, which was the first day Masterson would have been on duty, until possibly the 8th of January when he had to send the bid to Tulsa, Wilshire Oil Company of Texas with its home office in New York and its operating office in Denver and its Riffe Division in Tulsa, had no opportunity to make any investigation into Masterson's activities. The Riffe Division doors were closed to Wilshire's auditors until January 27, 1961.

It is a harsh rule indeed to hold that a corporation acquiring another through merger must quickly act as a policeman immediately checking all the salesmen of the company it is acquiring to discover whether or not any are in antitrust activities. Wilshire did not have ample opportunity to detect and reject the illegal practices. According to the Complaint, C.A. App. Volume I, page 12, the alleged conspiracy had been going on since 1959 in Kansas and since 1960 in Missouri, C.A. App. Volume I, Transcript, page 16. The other defendants apparently had not discovered it through their own legal departments and the government did not discover it until after a detailed, under oath, Grand Jury investigation beginning sometime in 1965.

Thus the evidence is conclusive that when Wilshire acquired its Riffe Division it could not have knowingly joined the conspiracy.

Neither the Indictment nor the proof are sufficient to charge the defendant knew of the existence of the conspiracy, agreed to became a part of it and with that knowledge committed some act in furtherance thereof as

required by law. The law is clear that in cases of joining an alleged conspiracy that is already in existence, the Indictment must allege that the conspiracy was formed; that the defendant knew of its existence; and with knowledge agreed to join it and committed some act in furtherance of it. The Indictment does not state that the defendant knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy. In the absence of such allegation and in the absence of such proof the Indictment and the proof in support thereto both are fatally defective.

The Tenth Circuit, has so held in the case of *Jay Jones v. United States*, (10 Cir., 1958) 251 F. 2d 288, certiorari denied 78 S. Ct. 703. This case was the prosecution of police officials and liquor dealers and others for conspiring to violate the laws of the United States by importing intoxicating liquor into the dry states of Oklahoma. The Tenth Circuit held that the evidence was insufficient to show that a defendant who was a Missouri liquor dealer who sold large quantities of liquors to the other defendants who were found guilty was a conspirator. The pertinent syllabus is as follows: syllabus 7:

> "A peron does not become liable as a conspirator unless he knows of the existence of a conspiracy, agrees to become a party, and with that knowledge, commits some act in furtherance thereof."

Also see syllabus 8:

> "In prosecution of city police officials, liquor dealers and others for conspiring to violate the laws of the United States by importing intoxicating liquors into dry state of Oklahoma evidence was insufficient to establish that operato of liquor stores in Missouri from whom quan ties of liquor were purchased

knew of conspiracy and consented to be party or knowingly did any act to accomplish its purpose."

The government's theory was that Wilshire knowingly joined a conspiracy.

The evidence is clear that the only knowledge of any of Wilshire's officials could have reached was through L. E. Riffe and Thomas Masterson, both of whom were knowledgeable as to affairs in Kansas. Masterson started working for Union Asphalts & Roadoils Co., in 1953 and left in 1957, and forming his own company, Universal Asphalt, he sold in Misouri. There is testimony that he knew the ropes in Kansas.

The evidence reveals that L. E. Riffe had worked for Allied Materials Corporation and Kerr-McGee, both of whom were indicted in Missouri and plead *nolo contendere.* Masterson had worked for Union Asphalt & Roadoils and sold for American Petrofina and Apco, all three of which were indicted in Missouri and Kansas and plead *nolo contendere.*

The fact that Wilshire acquired Riffe and that Riffe Petroleum Company had been guilty of any crimes through activities of one of its minor part-time salesmen would not be chargeable to Wilshire. See *United States v. Carter,* 311 F. 2d 934 (6 Cir., 1963).

"Prosecution for violation of statute making it unlawful for any employer to pay money to a union representative. The United States District Court for the Northern District of Ohio, Kalbfleisch, J., entered judgments of conviction and defendants appealed. *The Court of Appeals, O'Sullivan, Circuit Judge, held, inter alia, that a corporation's acquisition of assets of a subsiditary did not make acquiring corporation chargeable, as a principal, for crime previously com-*

mitted by subsidiary or an officer thereof in making an unlawful payment of money to a union representative, nor did conduct of acquiring corporation in failing to press for repayment of the spurious loan made to the union official or its act in charging off the note render it guilty of crime charged against it of paying money to a union representative of its employees." (Emphasis Added)

The Court in its opinion says:

"A corporation's acquisition of a subsidiary did not make acquiring corporation chargeable as a principal for crime previously committed by a subsidiary or an officer thereof in making a unlawful payment of money to a union representative."

The only knowledge Wilshire could have acquired would have been knowledge acquired prior to the merger by either Masterson or Riffe. Knowledge of an agent is not notice to a company where the agent acquires his knowledge prior to his becoming an agent and acquires his knowledge illegally.

The Court was careful to instruct on this score, so in the face of this instruction, it is hard for us to conceive how the knowledge of Masterson and Riffe was carried over into Wilshire. The Court at page 470 (C.A. App. Vol. III) says to the jury:

"In this connection I instruct you that any knowledge that Thomas Masterson or any officer or employee of Wilshire may have had of any conspiracy or any participating by him or them in any acts in furtherance of the conspiracy prior to December 31, 1960, or after August 9, 1963, are not chargeable to Wilshire."

Guilty knowledge of the conspiracy was not existent but for the knowledge of Masterson and Riffe which they

had acquired prior to the merger, and we feel the Court was inconsistent in his rulings, particularly when you take into consideration his remarks on the sentencing which took place on the 25th of October.

Counsel (C.A. App. Vol. IV p. 663) made remarks in mitigation and said:

> "I think Your Honor should ask yourself what chance did Wilshire have to avoid this situation. The merger was in early December. The effective date of the merger is January (December) 31, 1960, at which time three days later Masterson was in a meeting and he had already been in these meetings as Your Honor recalls from the evidence. Wilshire had no knowledge that is other than Riffe with whom it feuded violently as your Honor is aware of the two cases involving Wilshire's fight with Riffe."

The Court agreed with counsel (App. Vol. IV p. 663) where it said:

> "Well, I certainly take into consideration what you have had to say, Mr. Woolsey, about the situation. *The circumstances under which Wilshire acquired the Riffe Petroleum Company and in effect bought an on going conspiracy along with the assets of Riffe Petroleum Company* and I think the Court should consider that in mitigation." (Emphasis Added)

THE EVIDENCE AND INDICTMENT WERE INSUFFICIENT TO PROVE A CONSPIRACY IN RESTRAINT OF TRADE IN COMMERCE.

(FACTS REGARDING INTERSTATE COMMERCE)

The facts, as to the interstate aspect of the commerce in asphalt, presents an interesting situation which ties in

with our argument on double jeopardy. The facts as to interstate commerce are these:

A study of the map of the State of Kansas (Government Exhibit 227, Defendant's Exhibit A, Vol. III, 10th C.A. Appendix III Exhibits Document 231) shows that Kansas is divided into six highway divisions. In Division I at Kansas City, Kansas, was located Phillips Refinery at Kansas City, Kansas, in the Fairfax District. Derby, or Colorado, had a refinery at Wichita in Division 5. Mobil had a refinery at Augusta, Kansas, in Division 5. Skelly and American Petrofina each had a refinery at El Dorado in Division 5. Apco had a refinery at Arkansas City, Kansas, in Division 5. Riffe Division of Wilshire sold as a broker for Century Refining Company with a refinery located in Division 6 at Shallow Water, Kansas, and Consumers Co-op (Farmland) had a refinery at Phillipsburg located in Division 3. The only refinery that shipped asphalt into the State of Kansas was Standard's refinery located at Sugar Creek in Missouri at Kansas City, Missouri, and an examination of various exhibits (Government Exhibits 3 through 6, consisting of a tabulation of the bids by the State of Kansas, 10th C.A. Appendix, Vol. I Exhibits) and Government Exhibit 224, (Vol. I Exhibits) the delivery tickets covering deliveries of asphalt from American Oil Company's Sugar Creek refinery reveal that Standard shipped asphalt into Kansas into Division I the upper part of Division IV and a point in Clay County and Gary County in Division III in 1963.

A study of the bid tabulations reveals that Standard made no bids in Division III and VI where Consumers Co-op or Wilshire bid, and neither did it make any bids in Division V.

The Government relied only on the shipments of asphalt from Standard's refinery at Sugar Creek into Divisions I, II and IV in Kansas to establish its "in commerce" theory. The Court (10th C.A. App. Vol. III p. 418) advised counsel as to his instructions:

> "I will tell the jury as a matter of law on the question of interstate commerce aspect of the case that the crude, the fact that crude oil came into various refineries part of which later became liquid asphalt which was sold to the State would not be sufficient to establish the interstate commerce aspect of the case and further that the interstate shipment from the Sugar Creek refinery by American Oil Company, if the jury finds that these shipments were made pursuant to and as a part of the conspiracy, if the jury finds there was a conspiracy would constitute interstate commerce."

The Court instructed the jury (10th C.A. App. Vol. III p. 472) that the fact crude oil may have moved across the state line to one or more of the refineries should not be considered in determining whether or not interstate commerce was restrained and further that there was a cessation of movement in interstate commerce and a change in the form of the imported crude oil, so, therefore, a sale from a refinery in Kansas to the State of Kansas would be intrastate and not subject to the provisions of the Federal Antitrust Act.

The Court further instructed the jury (10th C.A. App. Vol. III p. 472) that if American Oil shipped liquid asphalt into Kansas in the furtherance of a conspiracy and that Wilshire was a co-conspirator, then, as a matter of law, the Government has proven the interstate commerce aspect. In this case the Government relied on solely the "in commerce" theory. Mr. Burke in arguing the case

(10th C.A. App. Vol. III p. 547) on the afternoon session of Monday, the 25th of September, 1968, on Motion to Dismiss stated:

> "Your Honor, the Government can proceed on one of the two theories. It can show it can proceed under the in commerce theory or affecting commerce theory. Under the in commerce theory it needs to show shipment across the state lines. Under the affecting commerce theory, it need *show no shipment across state line*, but that the price affected interstate commerce." (Emphasis added)
>
> "In this case, Your Honor, we are relying solely on the inflow or in commerce theory. They are both the same."

Under the in-flow or in-commerce theory it is not necessary for the Government to show any effect on commerce. All that is necessary to prove is that the product shipped in interstate commerce was restrained and the restraint in the Sherman Act price fixing and allocation of territories indictment is the price fixed and the allocation attached to the asphalt that was shipped from Sugar Creek, Missouri, to destinations in the State of Kansas.

The facts as to the interstate commerce aspect show the only "in commerce" business was the shipment of Standard's asphalt into Divisions I and IV in the Eastern part of Kansas with shipments to two Eastern-most counties in Division II. The proof was that Riffe Division of Wilshire only bid in Divisions III and VI and that Co-op with a refinery in Division III at Phillipsburg bid in Division III and VI and sold asphalt in those two and made a few bids in Division II and V. (Government Exhibits 3, IV, V and VI (10th C.A. App. Vol. I Exhibits).

The Government's counsel in his opening statement,

says its theory was each refinery agreed state-wide where it would bid and where it would bid low and where it would give phoney bids and Standard and Phillips agreed to bid, as far as the Eastern territorial situation was concerned, and carried the bid to the meeting at Wichita where the state was carved up like a piece of pie. The proof was that Masterson and Jackson, as to Divisions 1 and 4, insofar as Riffe Division of Wilshire and Consumers was concerned, no agreement between them would have any effect on interstate commerce.

The proof in this case shows that only one company imported asphalt into the State of Kansas—American Oil at Sugar Creek, just outside Kansas City, Missouri. This refinery sold asphalt in liquid form in northeastern Kansas in Division 1 and did bid and sell one year in Clay County in Division 2 but sold no further west and made no sales or bids any further west than Clay County. It sold some asphalt and made some bids in Division 4 but none in 5, 3, or 6. Wilshire through its Riffe Division made no sales or bids other than in Divisions 3 and 6 in the western-most third of Kansas. Co-op made no sales in Divisions 1, 3, 4 and 5 although it did make a bid in one county in Division 2. Since Wilshire made no bids and had no contact with Standard or Phillips there was no conspiratorial agreement shown between Wilshire and American upon whom reliance is sought to make an interstate commerce situation.

Paragraph 14 (e) of the indictment says: "Discussed and agreed that each defendant and co-conspirator would bid below the agreed-on f.o.b. price and freight rate for sales on which it was to be the low bidder and that each defendant and co-conspirator would bid the agreed-upon f.o.b. price and freight rate or above for sales on which

it had agreed not to be the low bidder. This is the method by which the so-called conspiracy was consummated in the State of Kansas. The indictment is silent as to whether or not there was an agreement on the part of Wilshire and Consumers not to bid in Divisions 1 and 4 and the Government is held therefore to paragraph 14 (e) as to the facts and there is no proof of facts to support this paragraph of the indictment insofar in Division 1 and 4. This fact situation brings us as far as Wilshire is concerned squarely within the case of *Addyston Pipe and Steel Company v. United States*, 175 U. S. 211, 44 L. Ed. 136. This case is the granddaddy of all anti-trust cases and has been followed all the way down to date. A check of Shepherd's Citator reveals that it has never been reversed or modified and has been commented upon on numerous occasions. The rule or law that concerns us is set forth in the fifth syllabus, the basic part of which is that inasmuch as Riffe Division of Wilshire made no agreement whatsoever with Standard, the out of state company, the principles set forth in the fifth syllabus of *Addyston* apply in this particular situation.

The action in the *Addyston* case was brought by the United States under the Sherman Act to obtain an injunction restraining six defendants engaged in the manufacture and transportation and sale of iron pipe from acting in a combination which was illegal and unlawful and in restraint of trade and commerce among the states. One defendant was located in the State of Ohio, one in Kentucky, two in Alabama and two in Tennessee. The line-up of the defendants was as follows:

Addyston Pipe and Steel Company, Cincinnati, Ohio

Dennis Long & Company, Louisville, Kentucky

Howard Harrison Iron Company, Bessemer, Alabama

Anniston Pipe and Foundry Company, Anniston, Alabama

South Pittsburg Pipe Works of South Pittsburg, Tennessee

Chattanooga Foundry & Pipe Works of Chattanooga, Tennessee.

The Petition charged the defendants with conspiring to allocate territories and fix prices in some 36 states and territories. The trial court dismissed the Petition 78 F. 712. The United States Court of Appeals reversed 85 F. 271. The U. S. Supreme Court affirmed but modified the restraining order insofar as it applied to sales in commerce and agreement between companies located in the same state. The fifth syllabus is as follows:

> "A combination to restrain competition proposals for contracts for the sale of certain articles which are to be delivered in the state in which some of the parties to the combination reside and carry on business is not, so far as those members are concerned, in violation of the anti-trust law of Congress, through the contract may be awarded to some party outside the state as to the lowest bidder."

The Court in its Opinion at page 149 of 44 L. E. says:

> "In one aspect, however, that judgment is too broad in its terms—the injunction is too absolute in its directions—as it may be construed as applying equally to commerce wholly within a state as well as to that which is interstate or international only. This was probably in inadvertence merely. Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and

therefore none over combinations or agreements, so far as they relate to a restraint of such trade or commerce. It does not acquire any jurisdiction over that part of a combination or agreement which relates to commerce wholly within a state, by reason of the fact that the combination also covers and regulates commerce which is interstate. The latter it can regulate, while the former is subject alone to the jurisdiction of the state. The combination herein described covers both commerce which is wholly within a state and also that which is interstate.

"*In regard to such of these defendants as might reside and carry on business in the same state* where the pipe provided for in any particular contract was to be delivered, the sale, transportation, and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case. They might make any combination they chose with reference to the proposed contract, *although it should happen that some nonresident of the state eventually obtained it.*

"The fact that the proposal called for the delivery of pipe in the same state where some of the defendants resided and carried on their business would be sufficient so far as the act of Congress is concerned, to permit those defendants to combine as they might choose, in regard to the proposed contract for the delivery of the pipe, and that right would not be affected by the fact that the contract might be subsequently awarded to someone outside of the state as the lowest bidder. In brief, their right to combine in regard to a proposal for pipe deliverable in their own state could not be reached by the Federal power derived from the commerce clause in the Constitution.

"To the extent that the present decree includes in its scope the enjoining of defendants thus situated from

combining in regard to contracts for selling pipe in their own state, it is modified and limited to that portion of the combination or agreement which is interstate in its character. *As thus modified the decree is affirmed.*" (Emphasis Partially Added)

DEFENDANT'S MOTION FOR A NEW TRIAL BASED ON PREJUDICIAL HEADLINES READ BY THE JURY WAS WELL TAKEN

When the Jury read headlines which in essence told the world that oil companies were offering a settlement to the State of Kansas there was a prejudice to the rights of the defendant Wilshire which could not be erased. The facts regarding this situation are as follows:

At page 422 of the Transcript (10th C.A. App. Vol. III) the situation was that closing arguments had been made to the jury after almost three weeks of trial. Mr. Burke for the Government had made an opening argument. Counsel for Wilshire had completed a portion of his argument. There was a noon recess for luncheon. During the recess Wilshire's counsel got news of the publication of a story in the Topeka Daily Capital on September 28, 1967, the headline of which is "Legislators Seek Suit Settlement for 12 Oil Firms, Court's Exhibit 1 (10th C.A. App. Vol. II Exhibits). Counsel for Wilshire related, beginning on page 422 (10th C.A. App. Col. III) the facts and circumstances as to the background.

This story in the paper told of a meeting on Wednesday, the day preceding the oral arguments, where members of the Kansas Highway Commission met with State Representative, Van Cleave, attorney for Phillips' Petroleum Company, and with attorneys for some of the other oil companies and had settlement negotiations of a $12,500,000 anti-trust suit brought by the State of Kansas

against all the oil companies, including Wilshire. Wilshire's attorneys were not present at the meeting and were not even invited. Wilshire's attorneys were not egagged in any settlement negotiations with the representatives of the State Highway Commission or the State of Kansas.

After the Court was apprised of the situation, the Court, beginning on Page 425 (10th C.A. App. Vol. III) in the presence of newspaper reporters castigated the press, calling it irresponsible journalism and then discussed with counsel the case of *Mares v. United States*, a Tenth Circuit Court of Appeals case, where a prejudicial newspaper article appeared in a Denver newspaper. Following the suggestions in that case, 383 F. 2d 805 (C.A. 10th Cir., 1967), the Court called and interrogated all of the jurors, beginning at page 433 (10th C.A. App. Vol. III), whether they had read any newspaper articles or heard any mention on television or radio, including the Topeka Daily Capitol. One of the jurors did state that the previous day's newspaper had been left in the jury room during the lunch hour. The Court admonished the jury again not to read any newspaper articles and again rebuked the press for prematurely breaking such story. Some of the jurors admitted that they had been reading headlines in the papers.

After the interrogation of the jury (10th C.A. App. Vol. III p. 433 *et seq.*) arguments resumed, instructions were given, and the jury retired to deliberate. That Thursday night, September 28, 1967, Kansas City Star published a story (Court's Exhibit 3, Vol. II Exhibits). This story elaborated on the story of settlement negotiations and named Wilshire as one of the defendants. The headlines were "Attempt Made at Oil Accord—Kansas Highway Board Meets with Counsel for Firms—No Commitments Yet—

Talks Explore Possibility of Antitrust Settlement." The article went on to tell of the meeting by a group of lawyers representing some of the companies. It mentioned that similar anti-trust suits were settled out of court in Oklahoma and Missouri, named the defendants in the anti-trust case, which included Wilshire Oil Company of Texas, and then stated the Petition alleged violation of state anti-trust laws in the sale of road asphalt to the highway Commission.

At the same time the Kansas City Kansan published a similar settlement story on Thursday, September 28 (Court's Exhibit 2, Vol. II Exhibits) with the headline: "On Asphalt Case Settlement Hint." Friday morning, September 29, 1967, the Kansas City Times published a story before the jury resumed its deliberations: "Asphalt Suit goes to Jury. Deliberations will be Resumed at 9:30 o'clock Today." This story told of the settlement negotiations and the interrogation of the jury by the Judge on the subject of whether or not they had read the Topeka Capitol story. Underneath this story was an article saying "Talk of Settlement."

The contents of all the articles show that settlement was being considered with the State of Kansas by defendants including Wilshire, with respect to the State's claim in the case of the State of Kansas v. the oil companies arising out of the liquid asphalt sold to the State of Kansas, and that the Federal Criminal anti-trust case being considered by the jury involved a conspiracy with respect to the sale of liquid asphalt to the State of Kansas. The Court admonished the jury (10th C.A. App. Vol. III, P. 481):

"You are not to read any newspaper articles or watch

or listen to any television or radio programs."

and further:

> "Any violation by you of the admonition could result personal embarrassment, *possible punishment* and certainly something that all of us would like to avoid." (Emphasis Added)

The record reveals that following the Court's admonition of Thursday night, September 28, the jury was excused for the night and reconvened on the morning of Friday, September 29 and retired, following which the record reveals counsel for Wilshire (10th C.A. App. Vol. III p. 482) called the attention of the Court to the news paper articles published in the Kansas City Star Thursday, September 28, in the evening; one in the Kansas City Times on Friday, September 29; and one in the Kansas City Kansan of Thursday, September 28, which were marked as Court's Exhibits 2, 3 and 4. (Appendix Vol. II Exhibits) The jury was then excused at noon after deliberations and having the exhibits sent in and a reading of Mance's testimony and returned to deliberate at 1:00 P.M. when the rest of Mance's testimony was read to the jury.

After deliberations of over an hour the jury returned a verdict of guilty (10th C.A. App. Vol. III p. 494). At the request of counsel for the defendant, the jury was then interrogated by the Court about the three Kansas City papers, as to whether or not they saw the headlines and at the suggestion of counsel the Court interrogated the members of the jury as to the headlines. The jurors were interrogated one at a time in such fashion the jurors remained in the box and did not go back to the jury room to discuss the subject of the interrogation. Juror Kidd admitted seeing the headlines in Court's Exhibit 3 (10th

C.A. App. Vol. III p. 502), the Kansas City Star of September 29, as follows: "Attempt Made at Oil Accord—Kansas Highway Board Meets With Counsel for Firms—No Commitments Yet—Talks Explore Possibility of Antitrust Settlement." He says: "Juror Kidd: I believe that was in last night's Kansas City Star and I did see the headlines. I did not read any further." "The Court: Did you see how much of the headlines did you read?" "Juror Kidd: I saw the word Highway Department and the word *Asphalt* and I did not read any further."

We point out at this point that the word *Asphalt* appears at the bottom of the article, and we can assume that Juror Kidd must have read everything in between, including the fact the State of Kansas had sued the oil companies, including Wilshire, and that similar anti-trust suits were settled out of court in Oklahoma and Missouri. Kidd told the Court he assumed there was a connection between the headlines and the case he tried. Juror Burt (10th C.A. App. Vol. II p. 506) admitted seeing the headlines in Courts Exhibit 3, the Kansas City Star of Thursday, September 28. Juror Burt says: "I saw 'An Attempt Made at Oil' and I read right there. As soon as I saw what it was, I read no more because it was something evidently that had to do with this (case)."

Juror Choplin (10th C.A. App. Vol. III p. 515) admitted seeing the Kansas City Star issue of September 28, 1967, and said as follows:

> "The Court: Did you see or read last night's issue of the Kansas City Star, the issue of September 28, 1967?
>
> "Juror Choplin: I read part of it.
>
> "The Court: Did you happen to see in that issue a

headline reading 'Attempt Made at Oil Accord—Kansas Highway Board Meets With Counsel For Firms—No Commitments Yet—Talks Explore Possibility of Anti-trust Settlement?

"Juror Choplin: I saw the first big headline and I think I probably would have read more but since yesterday afternoon I thought it might pertain to that so I didn't read it.

"The Court: Well, I'll hand you that issue which has been marked Court's Exhibit 3 and ask you to read into the record that part of the headline which you did read.

"Juror Choplin: Just the large thing. It says 'Attempt Made at Oil Accord' and that is all I read because when it said oil I quit."

Several other jurors admitted seeing the papers in question but none admitted having seen the articles with the headlines.

At the conclusion of the interrogation the Court again castigated the press about irresponsible journalism. Counsel for defense then stated the facts, as a member of the bar, as to his knowledge of the meeting, telling the Court the first intimation he had of any meeting of settlement was (10th C.A. App. Vol. III p. 526) when a lady newspaper reporter asked him if he had been at the meeting in Topeka and counsel stated to the Court that he had no knowledge of any meeting and had not authorized anybody to attend any meeting and settlement negotiations. The issue on the reading of the headlines by the jurors was set forth in Defendant's Motion for Judgment of Acquittal or in the alternative for a New Trial. These motions were presented, argued and overruled after extensive briefing.

We point out the Court's admonition and suggestion of possible punishment to show how difficult it would be to an inquisitive juror who is an average citizen to admit having seen what happened in the papers Thursday night in the Kansas City Star and the Kansas City, Kansas paper and Friday morning in the Kansas City Times. It taxes one's credulity to believe the jury after a punishment threat by a Federal Judge would admit having read any of the three articles.

Mr. Burkhead of the Kansas Attorney General's office was a visitor during the trial and present in the courtroom. It had been mentioned in the trial that he was the Kansas Attorney General present in the courtroom.

There are many cases in support of our position that the Court would grant a new trial by reason of the fact several jurors admitted reading one or more of the headlines advising them of the settlement negotiations.

The most recent is the case of *Arthur Mares v. United States of America*, (C.A., 10th Cir.) 383 F. 2d 805, #9346, decided August 15, 1967. In this case Arthur Mares was convicted of robbery of a federal insured savings and loan association. A news article reported a confession which the trial court excluded.

The jury was given a strong comprehensive admonition against reading, listening to, or watching reports about the trial.

The Rocky Mountain News under bold headlines "Robbery Confession Admission Denied," told of guilty pleas, confessions, and the excluded evidence.

Defense counsel twice moved for a mistrial requesting the jury be polled as to whether they read it.

Judge Breitenstein in his opinion says:

> "If any juror *even saw the headline* and connected it with the trial in progress, the possibility that it would not prejudice that juror is so slight that it merits no consideration."

The *Mares* case cites *Howard R. Marshall v. United States*, 360 U.S. 310, 3 L. ed. 1250, 79 S. Ct. 1117, decided June 15, 1959. In this case the defendant was convicted in the United States District Court of Colorado on a charge of unlawfully dispensing drugs. The Court of Appeals affirmed his conviction. See 258 F. 2d 94.

The Supreme Court reversed in 360 U. S. 310, mainly because jurors read certain newspaper articles regarding the defendant's previous record in Oklahoma, which had been offered by the Government and excluded by the trial judge. A mistrial sought by the defendant; the trial judge denied the mistrial; and the Court of Appeals affirmed. Two damaging articles were published, and the trial judge learned of the articles and summoned the jurors into his chamber one by one and inquired if they had seen the articles. Three had read one of the articles, another had read two of the articles, three others had scanned the articles, and each of the jurors told the trial judge he would not be influenced by the news articles, as in the case at bar. The court in its opinion said in the second syllabus

> "In the exercise of its supervisory power to formulate and apply proper standards for enforcement of criminal law in the federal courts, the Supreme Court will reverse a judgment convicting a defendant of unlawfully dispensing a certain drug and will order a new trial, where newspaper accounts as to the illegal practice of medicine by the defendant had reached the

jurors and the information contained in the newspapers was of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence."

There is an excellent annotation in 3 L. ed. 2d. beginning at page 2004.

We have but to refer to the case of *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. ed. 2d. 600, 86 S. Ct. 1507, where Dr. Sheppard's rights were prejudiced by unfavorable news publications during the trial, and a reference to this case shows how zealously the Court should guard against such matters and grant mistrials or new trials where episodes have occurred.

An excellent annotation on the subject of "jurors reading of newspaper account of trial in criminal case during its progress as grounds for mistrial, new trial, or reversal" is found in 31 A.L.R. 2d beginning at page 417. At page 421 the text writer in A.L.R. says:

"Ultimate decision rests in discretion of court.

"In the following cases the courts have held that the juror's reading a newspaper account of the trial in a criminal action during its progress is grounds for a new trial or mistrial rests in the sound judicial discretion of the court."

citing a number of United States cases, among which the following are of interest to us:

Van Riper v. United States, (C.A., 2nd Cir.) 13 F. 2d 961, syllabus 5:

"If newspapers seen by jury affected verdict, matter held one of discretion for trial judge."

A very excellently considered opinion, although it is

a District Court opinion in the United States District Court at New York in 1930, is the case of *United States v. Montgomery,* 42 F. 2d 254. The opinion by Judge Woolsey is as follows:

> "Publication of articles concerning defendant in public press in afternoon and morning papers held such as necessarily to prevent a fair trial, to warrant a mistial."

In this case Judge Woolsey called the jurors in after some of the unfavorable publication during the course of the trial, interrogated the jurors, and asked them as to their impression. They all stated they could deal with the case on the evidence except one who seemed, according to the Court, to answer the questions rather inconclusively.

An earlier case is one from the Circuit Court of Appeals for the Third Circuit, *Griffin v. United States* (1924), 295 Fed. 437, syllabus 3:

> *Criminal law Key 855(5)—Court erred in not withdrawing jurors and granting new trial, where they read newspapers containing prejudicial statements.*
>
> "In prosecution for conspiracy to default the United States, the court erred in not withdrawing a juror and granting a new trial, where there fell into the hands of the jury newspapers stating that the prosecuting attorney said that five of the defendants had offered to make a clean breast of their part in the conspiracy and turn state's evidence, and that he held a written confession of three of the defendants, in addition to two who had pleaded guilty."

A fairly recent case is that of *Coppedge v. United States,* (C.A., District of Columbia, 1959) 272 F. 2d 504 (certiorari denied; 82 S. Ct. 92, 368 U. S. 855, 7 L. Ed. 2d 52) Syllabus 2:

"Criminal Law Key 855(5)

"In view of nature of newspaper articles, which disclosed that witness, who had been observed by jurors refusing to take stand despite repeated and peremptory direction of court, was in mortal terror of defendant, that defendant was serving a term in penitentiary for violent assault upon such witness' brother, that prosecutor was of opinion that defendant was a vicious criminal, and that judge was of opinion that witness could not be protected from defendant, either in or out of jail, court should have made, out of presence of remaining jurors, careful, individual examination of each of jurors involved as to possible effect of articles which such jurors admitted having read; but, in any event, it would have been impossible to have cured in mind of any reasonable juror damage done to cause defendant by statements in newspaper articles, and, accordingly, it was error to deny mistrial."

In conclusion on this phase of the case permit us to say that there are a large number of state court decisions along the same line; however, it would unduly lengthen this petition to make reference thereto.

CONCLUSION

In summary this case must be reversed on one or all of the four principal grounds—

Double Jeopardy

Failure to allege and prove Wilshire knowingly joined a conspiracy

Lack of Sufficient Showing of Interstate Commerce

Unfavorable Publicity Read by the Jurors

Respectfully submitted,

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APPENDIX I

Filed United States Court of Appeals Tenth Circuit, Mar. 24, 1970. William L. Whittaker, Clerk.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT
JANUARY, 1970, TERM

No. 87-69

UNITED STATES OF AMERICA,
Plaintiff-Appellant.

vs.

WILSHIRE OIL COMPANY OF TEXAS,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(District Court No. K.C.—CR.-873)

W. Richard Haddad, Attorney, Dept. of Justice, Washington, D.C., (Richard W. McLaren, Assistant Attorney General, Howard E. Shapiro, Attorney, Dept. of Justice, Washington, D. C., John E. Sarbaugh and Raymond D. Hunter, Attorneys, Dept. of Justice, Chicago, Illinois, on the brief) for Appellee;

Robert J. Woolsey of Farmer, Woolsey, Flippo & Bailey, Tulsa, Oklahoma. (Harry W. Colmery of Colmery, Davis, Bennett, Leonard & McClure, Topeka, Kansas, on the brief) for Appellant.

Before LEWIS, HILL and SETH, United States Circuit Judges.

HILL, Circuit Judge.

On April 5, 1966, a federal grand jury for the District of Kansas indicted ten corporations[1] charging each with having violated 15 U.S.C. § 1. Specifically the indictment charged "the defendants and co-conspirators entered into and engaged in a combination and conspiracy in unreasonable restraint trade and commerce in liquid asphalt in violation of Section 1 of the . . . Sherman Act." All defendants except Wilshire plead non contendere and were subsequently fined from $25,000 to $40,000 each. Wilshire's case was tried to a jury and resulted in a guilty verdict and a fine of $25,000. Motions for judgment n.o.v., for judgment of acquittal, new trial and a motion to dismiss on double jeopardy grounds were all overruled, with the latter meriting a special hearing.[2] Wilshire has appealed.

A thumbnail sketch of the uncontroverted facts reflects that Wilshire is a Delaware corporation which, in late 1960, purchased Riffe Petroleum Company and operated it as an unincorporated division of Wilshire until August, 1963, when Riffe was sold. It was during that period of time that Wilshire admittedly sold liquid asphalt to the State of Kansas and allegedly participated in an

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1 The ten corporations indicted were: Wilshire Oil Company, Socony Mobil Oil Company, Skelly Oil Company, the Consumers Cooperative Association, American Petrofina Company of Texas, Union Asphalt and Roadoils, Colorado Oil and Gas Corporation, The American Oil Company (Standard of Indiana), Phillips Petroleum Company, and Apco Oil Corporation.

2 The defense of double jeopardy was first raised by Wilshire in a pretrial motion at which time both parties agreed, with the court's permission, to submit the matter in a post-trial evidentiary hearing if Wilshire were ultimately found guilty. After conviction, Wilshire renewed its attack upon the prosecution by reason of claimed double jeopardy, and a special hearing on the issue was held. The burden was, by agreement of the parties, upon Wilshire. At the conclusion of the hearing, Wilshire requested that the trial court enter its findings of fact and conclusions of law under Rule 23, F. R. Crim. P. 18 U.S.C.A., which the trial court correctly deemed inapplicable. Nonetheless, upon Wilshire's request the court recited its findings, framing them in terms of the Government's burden of establishing beyond a reasonable doubt that there was not a single multistate conspiracy.

illegal conspiracy to fix the price of such asphalt. The charged conspiracy operated in the following fashion. The state is divided into six highway districts. Yearly the state asphalt buyer determines the location or "points" in each district which will require asphalt during the ensuing year. Bid invitations are then mailed to all asphalt sellers in the area. Upon the enclosed blank bid is a list of all the asphalt-requiring "points" in the state. The sellers then list the per gallon price at which they are willing to deliver the asphalt to each point on which they wish to bid. The sealed bids are then opened publicly and contracts are awarded to the lowest bidder on each "point." The alleged bid rigging operated on an over-under system. During each year involved and prior to submitting their "point" bids, the alleged conspirators met to agree on freight rates to the various districts and "points" and to set a base per gallon price. Before the meeting was concluded each company was assigned certain "points" which it was to win in the bidding. Then, on the basis of the prearranged formula, each company bid under formula price on each "point" allocated to it and over the base cost, plus rates, on others not assigned to it. During the course of the conspiracy, from 1959-65, approximately 112,000,000 gallons of liquid asphalt valued at about $12,000,000 were sold and delivered by the named oil companies. Of the gross amount, about 2.6 million gallons were shipped in interstate commerce. Subsequent to the Wilshire-Riffe merger, it received contracts for ten to twelve million gallons per year, all of which were shipped intrastate.

On this statement of fact the appellant first argues that the indictment and evidence are insufficient since it is neither charged nor proved that Wilshire knowingly joined the conspiracy. We treat the indictment attack first. The fatal defect urged consists of a failure to allege that the conspiracy was formed and in existence; that Wil-

shire knew of its presence and knowingly agreed to join and commit acts in furtherance of its purposes. The single case cited as authority for this allegation[3] is inappropriate, and discussion of it will be deferred until a timely moment. To determine the sufficiency of an indictment the court views the entire document[4] to ascertain whether the offense is charged with sufficient clarity so as to safeguard two constitutional guarantees: the Sixth Amendment right to be informed of the nature and cause of the accusation in order to prepare a defense; and the Fifth Amendment protection against twice being placed in jeopardy for the identical offense.[5] The indictment adequately apprised Wilshire of its participation in the conspiracy and was not faulty for the reasons urged. The defendants and co-conspirators were charged with entering into and engaging in a continuing conspiracy from 1959 to 1965,[6] but the indictment specifically stated that Wilshire only participated from December 31, 1960, until August 9, 1963.[7]

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3 **Jones v. United States**, 251 F.2d 288 (10th Cir. 1958).

4 **Imperial Meat Co. v. United States**, 316 F.2d 435 (10th Cir. 1963); **Carlson v. United States**, 249 F.2d 85 (10th Cir. 1957); **United States v. Armour & Co.**, 137 F.2d 269 (10th Cir. 1943).

5 **United States v. Tijerina**, 407 F.2d 349 (10th Cir. 1969); **Nelson v. United States**, 406 F.2d 1136 (10th Cir. 1969); **Woodring v. United States**, 376 F.2d 824 (10th Cir. 1944); **United States v. Armour & Co.**, 137 F.2d 269 (10th Cir. 1943); 8 Moore's Federal Practice § 7.04 at 7-14 to 7-20. (10th Cir. 1943); 8 Moore5s Federal Practice § 7.04 at 7-14 to 720.

6. Paragraph 12 reads: "Beginning some time prior to 1959 and continuing thereafter through at least 1965, the exact dates being to the grand jurors unknown, the defendants and co-conspirators entered into and engaged in a combination and conspiracy in unreasonable restraint of the hereinbefore described interstate trade and commerce in liquid asphalt in violation of Section 1 of . . . the Sherman Act."

7 Paragraph 3 reads: "Wilshire Oil Company of Texas . . . a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Denver, Colorado, is hereby indicted and made a defendant herein. Riffle Petroleum Company, a corporation organized and existing under the laws of the State of Oklahoma, was purchased by and merged with Wilshire Oil on or about December 31, 1960. From about December 31, 1960 until August 9, 1963, Riffe Petroleum Company was operated by Wilshire Oil as an unincorporated division of Wilshire Oil. From about December 31, 1960 until August 9, 1963, Wilshire Oil, through its Riffe Petroleum Division, engaged in the business of distributing and selling liquid asphalt in the State of Kansas and in other States."

Rather than a devious attempt to conceal vital elements of a defect-free indictment, this was an adequate attempt to further vouchsafe Wilshire's constitutional rights. The record vividly reflects that appellant was made cognizant of the charge and facts constituting the breach of law;[8] was able to plead, prepare a defense and produce witnesses to meet the charge. The practical effect was that the protection to be afforded by the indictment was furnished.

The brunt of the sufficiency of evidence argument focuses on the propriety of attributing the previously obtained guilty knowledge of a Riffe Division agent, to Wilshire after the merger. At this juncture Jones v. United States, 251 F.2d 288, 293 (10th Cir. 1958) is material. In that opinion we said: "A person does not become liable as a conspirator unless he knows of the existence of the conspiracy, agrees to become a party, and with that knowledge commits some act in furtherance thereof. [citing cases]. This knowledge and participation may be inferred from the circumstances, acts and conduct of the parties." The agent caught in the cross-fire of this argument was first employed by Riffe in early 1960, to represent its asphalt interests in Kansas and Colorado. Riffe was the broker for asphalt produced at the Century Refining Company at Shallow Water, Kansas, and it was the agent's responsibility to procure contracts with the state and local governments of Kansas. The agent attended the 1960 meeting of asphalt salesmen when the "points" were divided up and was successful in getting only nine of them in a single western Kansas division. In 1961 he was a Wilshire

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8 Wilshire's pre-trial motion to dismiss is further evidence that it was well informed by the indictment of the charge lodged against the company. That motion implicitly acknowledges that they were charged with joining and participating in an on-going conspiracy, and read in part: that this defendant knew of the existence of the conspiracy, agreed to that this defendant knew of the existence of he conspiracy, agreed to become part of it, and with that knowledge committed some act in furtherance thereof, required in this case because of other allegations in the indictment."

agent when he attended the conspirator's meeting, and was then able to win forty-two western Kansas "points." Wilshire argues that the only knowledge it could have had regarding their participation in the conspiracy was knowledge acquired prior to the merger and they are thereby liable for neither the pre-merger crime nor their post-merger involvement. The first argument is wide of the mark since the prosecution of Wilshire extends only from late 1960 to August, 1963. The latter statement is novel in that it ignores facts and circumstances which permit the court and jury to imply ratification or acquiescence. We pause to note that the argument does not deny that an agent's knowledge is imputed to the corporation if gained while acting in the scope of employment. The proposition merely suggests that Wilshire is immune from prosecution here because of a fortuitous series of events which placed them at the scene after the acquisition of the agent's information.

There is no question about the continuing nature of the plat nor is there reasonable doubt that Wilshire was a part thereof. And we believe the ticklish problem of pre-merger knowledge must be decided against Wilshire on the facts. Although appellant claims to have unwittingly bought into an on-going conspiracy and for that reason it ought to be excused, the totality of the evidence supports the conclusion that Wilshire had ample opportunity to detect and reject the illegal practices. This is not a case where a company was purchased without chance for scrutinizing observation prior to assumption of control. The agreement of merger is dated September 23, 1960. This ought to have given appellant adequate time to become intimately familiar with the modus operandi of Riffe. And undisputed evidence was tendered by the Kansas salesman of Riffe Division from which it may be concluded that during the three year affiliation of Riffe with Wilshire, the vice-president in charge of the Riffe Division knew of and acquiesced in the continued conspiratorial

participation. Wilshire is unable to rid itself of liability because of its inability to personally supervise the acquired company and its subordinates particularly when they failed to object a single time during the three year association. Viewed in the light most favorable to the Government, the evidence tendered by the prosecution provided ample basis for a jury, properly instructed, to find the requisite knowledge and participation by Wilshire.

Appellant next contends that the indictment and evidence are insufficient by their failure to set out factual allegations and proof of a conspiracy in restraint of interstate trade. It has long been settled that "[a]greements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition." Ethyl Gasoline Corporation v. United States, 309 U. S. 436, 458 (1940). To sufficiently allege the interstate nature of the offense, the indictment need only charge that a combination was formed to fix prices on goods traveling interstate and that it had that effect or contributed to that end.[9] The indictment alleged that "[s]ubstantial quantities of liquid asphalt purchased by the State of Kansas and transported into Kansas in a continuous and uninterrupted flow of interstate commerce directly from the refinery of the American Oil Company which is located at Sugar Creek, Missouri, to job sites in Kansas." The purpose was "to fix, maintain, and establish noncompetitive prices for the sale of liquid asphalt to the state of Kansas." And the effect was that "prices of liquid asphalt to the State of Kansas have been fixed, maintained, and established at high, artificial, and non-competitive levels." Hence, the substance of the statutory offense is charged as are the facts supporting the offense and the indictment is sufficient.

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9 See **United States v. Socony-Vacuum Oil Co.**, 310 U.S. 150 (1940); **Revely Dairy Co. v. United States**, 178 F.2d 363 (8th Cir. 1949).

The evidence is not insufficient merely because Wilshire itself was not shown to have shipped into Kansas. The apposite inquiry is whether appellant was engaged in a plot which maintained prices on products, a part of which moved in interstate trade.[10] The evidence is undisputed that Standard Oil shipped asphalt into Kansas. It is not contested that Standard won numerous "points" in northeast Kansas as a result of the conspiracy nor is it denied that the interstate goods went to those "points." None of the agents deny that Standard was an active participant in the scheme, nor does the Standard salesman. Furthermore, contrary to Wilshire's argument, all oil company representatives agreed that there was one Kansas conspiracy which dealt with all the highway districts. A careful review of the testimony and exhibits reflects abundant evidence from which the jury could properly find the existence of one conspiracy which included Wilshire in western Kansas and Standard Oil in eastern Kansas.

The next point urged by Wilshire is that the court erred in overruling their motion for a new trial based on the jurors' reading of a newspaper headline. Near the close of the trial several prejudicial newspaper articles were called to the court's attention. Following the practice commenced in Mares v. United States, 383 F.2d 805 (10th Cir. 1967), each juror was separately examined by the court. The trial court determined that three jurors saw part of a headline but that each heeded the admonition of the court and desisted from reading the story. The readline read: "Attempt Made At Oil Accord—Kansas Highway Board Meets With Counsel for Firms—No Commitments Yet—Talks Explore Possibility of Antitrust Settlement." Although there is no mention of Wilshire in the headline, appellant argues that prejudicial conclusions are the nat-

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10 **United States v. Painters' Dist. Council No. 14**, etc., 44 F.2d 58 (N.D. Ill. 1930); **Boyle v. United States**, 40 F.2d 49 (7th Cir. 1930).

ural result of having viewed the caption. Ultimate reliance is placed on Mares v. United States, supra, and Marshall v. United States, 360 U.S. 310 (1959), which, as the trial court noted, do not govern the instant situation. In Mares the story and headlines reported prior confessions of the defendant for the very crime for which he was then being tried. In Marshall the newspaper exposed evidence which had previously been ruled inadmissible at trial. The instant headlines and story do not approach such prejudicial comment. The trial judge found no reason to infer prejudicial conclusions from the jurors' brief encounter and neither can we. Welch v. United States, 371 F.2d 287 (10th Cir. 1966). We find neither error nor abuse of discretion in the trial court's manner of handling the problematical issue.

On the proposition that Wilshire and others were convicted in a federal court for participation in an asphalt conspiracy in Missouri, it is contended that the prosecution here twice places Wilshire in jeopardy. Appellant's basic plea is that the government is attempting to splinter a single conspiracy into two parts, i.e., a Missouri conspiracy and a Kansas conspiracy, when in fact and law the two are but fragments of a single scheme. The indictments in Kansas and Missouri are in some respects identical, with the following relevant exceptions. (1) Different parties are named in each: there are eight corporations common to both; two were named in Kansas and not in Missouri; ten corporate and seventeen individual defendants were named in Missouri and not in Kansas. (2) There are overlapping but different dates of existence: in Missouri it was from 1960-63 and in Kansas from 1959-65. (3) The offenses charged vary: the Missouri indictment charged that the defendants and co-conspirators acted to "suppress and eliminate competition in the sale of liquid asphalt to the State of Missouri . . .": the Kansas indictment charged the co-conspirators and defendants with conspiring "to fix, maintain, and establish non-com-

petitive prices for the sale of liquid asphalt to the State of Kansas . . ." Although a single plot may not be severed into several in order to proliferate penalties, prosecution for one offense will not confer immunity from subsequent prosecutions of distinct, though related, offenses.[11] Thus the pertinent inquiry is whether the record presented by Wilshire is sufficient to establish that it and all other oil companies indicted in Missouri and Kansas had a single, common and continuing objective of fixing, maintaining and establishing prices to suppress and eliminate competition in the sale of liquid asphalt to Kansas and Missouri.[12] If so, there would be but one conspiracy even though its purposes were advanced in diverse parties. Contrariwise, if the Missouri defendants did not share such broad objectives with their Kansas counterparts, but were attempting only to fix prices within their respective states, there were multiple conspiracies with each pursuing its own distinct illegal end.

Because the resolution of the question depends on the facts of each case, we are hesitant to follow other decisions unless they are on all fours with this suit. Appellant urges that the Honda cases[13] and United States

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11 **Hattaway v. United States**, 399 F.2d 431 (5th Cir. 1968); **Nelms v. United States**, 291 F.2d 390 (4th Cir. 1961); **United States v. Cohen**, 197 F.2d 26 (3rd Cir. 1952); **Upshaw v. United States**, 157 F.2d 716 (10th Cir. 1946); **United States v. American Honda Motor Co.**, 273 F. Supp. 810 (N.D. Ill. 1967); **United States v. American Honda Motor Co.**, 271 F. Supp. 979 (N.D. Cal. 1967).

12 The burden of proving former jeopardy for the same offense by a preponderance of the evidence rests upon the movants. **Sanchez v. United States**, 341 F.2d 225 (9th Cir. 1965); **Rothaus v. United States**, 319 F.2d 528 (5th Cir. 1963); **Reid v. United States**, 177 F.2d 743 (5th Cir. 1949); **United States v. Potash**, 118 F.2d 54 (2nd Cir. 1941); **United States v. American Oil Co.**, 296 F. Supp. 538 (D. N. J. 1969); **United States v. Koontz Creamery, Inc.**, 257 F. Supp. 295 (D. Md. 1966).

13 **United States v. American Honda Motor Co.**, 289 F. Supp. 277 (S.D. Ohio 1968); **United States v. American Honda Motor Co.**, 273 F. Supp. 810 (N.D. Ill. 1967); **United States v. American Honda Motor Co.**, 271 F. Supp. 979 (N.D. Cal. 1967).

v. Koontz Creamery, Inc., 257 F. Supp. 295 (D. Md. 1966) are such cases. After careful examination of the facts in each, we are unable to concur with Wilshire's analogy. In each of these cases the courts were dealing with facts which do not coalesce with Wilshire's.

In Koontz, the defendants were milk distributors who had been earlier convicted for fixing prices on school milk in the Baltimore area. They were then indicted for fixing other wholesale and retail milk prices during the same period of time in the same area. The trial court granted their motion to dismiss on double jeopardy grounds on the following facts. The defendants in both cases were substantially identical; that met or were represented at meetings at the same principal place under the auspices of the Milk Distributors Association; the meetings were called and conducted the same whether the purpose was school bids, labor costs, the price of raw milk, jugs, jug pricing and deposits, or other matters of interest; at the meetings the subject matter usually covered numerous topics relating to the overall price control scheme. The court concluded: "The purpose of the defendants, conspiratorial or not, was to maintain market price stability in the Baltimore milk market. . . . and that actions with respect to school milk, street milk, and jug milk were actions designed to control certain aspects of distribution, all of which were facets of, or factors in, the overall price structure." United States v. Koontz Creamery, Inc., 257 F. Supp. at 305.

In the Honda cases, American Honda was first tried and convicted for fixing prices on Honda motorcycles in the Los Angeles area. Thereafter indictments were returned against them in northern California, northern Illinois and southern Ohio for identical offenses. In each of the latter cases Honda moved for dismissal on double jeopardy grounds, which were granted. The persuasive evidence in those cases was as follows: Honda dealers in each area are

concerned with the retail price structure in all other areas; price-cutting affects the ability of dealers to maintain proper servicing and advertising and in turn the product's reputation is injured; all dealers are concerned about discounting in one area because of the tendency of others to follow suit; the widespread price stability is a strong inducement to prospective dealers; and discounting in any area affects trade-in value as compiled for the trade Blue Book The courts said: "It is unrealistic to conclude that dealers in one region were wholly unconcerned with the maintenance of prices in other regions and concerned only with price maintenance by dealers in their own particular region.' United States v. American Honda Motor Company, 271 F. Supp. at 985 and United States v. American Honda Motor Co., 273 F. Supp. at 818.

Wilshire was given opportunity in an independent evidentiary hearing to develop facts to support its double jeopardy claim. But the testimony proffered then simply does not compare favorably to the above cases. Because the Missouri defendants plead nolo contendere, we have no testimony to examine and compare to that offered in the Kansas trial. We are thus compelled to rely exclusively upon the evidence tendered in the post-trial hearing on the double jeopardy claim. Wilshire's Kansas agent testified first. In highly synthesized form, he repeatedly affirmed that although he knew of the Missouri conspiracy and participated in the one in Kansas, he knew of no connecting link between the two. To his kowledge there was never any discussion relative to the Missouri bidding, during the course of the Kansas meetings; Wilshire never discussed with the competitors the restriction of Kansas bidding in anticipation of more Missouri contracts; and he knew of no attempt by any of the companies to take less in one state to gain in the other. Next the Missouri salesman of the Riffe Division of Wilshire volunteered that there was never any connection between their bids in

Missouri and Kansas. Finally a Skelly salesman reaffirmed that he knew of no Kansas meetings where the Missouri lettings were discussed nor any Missouri meetings where Kansas bids were talked about. He added that neither his company nor any of the others restricted their bids in one stated to secure additional "points" in another state. He concluded by answering that there was never any statement made to him that there was any connection between the bids in the two states. And on cross-examination he further elaborated that there was never a meeting where they talked about one state and then switched to the other. At the conclusion of the evidentiary hearing, the trial judge entered findings which, coupled with the testimony, refute any favorable comparison of this case to the Koontz or Honda cases.[14] In short, there is a general absence of testimonial evidence which supports appellant's double jeopardy claim. Our conclusion is but an echo of the trial judge's that the parties here were tried for a plot involving a distinctively separate conspiratorial purpose.

It is also urged that counsel for the Government was guilty of making inflammatory remarks sufficient to en-

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14 The trial judge found: ". . . that the government has established beyond a reasonable doubt that there was not one large conspiracy split into small ones . . . The sole subject of the Kansas conspiracy was to allocate points or by allocating points, fix the prices of liquid asphalt sold to the State of Kansas, and the purpose of the Missouri conspiracy was identical except that it had to do with the sale of liquid asphalt to the State of Missouri.

I find that the conspiracies charged . . . were completely different and unconnected although necessarily, as the evidence progressed, there was some reference back and forth to the dealings between the defendant here and the other defendants in the case and the State of Missouri.

I find that the proof of the matters charged in the Kansas indictment would not have been admissible had there been a trial on the Missouri indictment and that if admitted, it would not have sustained a conviction on the Missouri indictment."

title Wilshire to reversal. The remarks were improper[15] but even if they were prejudicial their impact was promptly removed by the trial court's instruction to the jury. The determination of the extent of permissible argument rests primarily in the discretion of the trial court. We do not agree that remarks made by counsel were of such gravity as to require reversal in view of the timely admonition of the lower court.[16]

The trial court imposed a fine of $25,000 on Wilshire. The maximum fine allowed by 15 U.S.C.A. § 1 is $50,000. Appellant says the fine was excessive. We have often held that when the punishment is within the statutory limit, this court will not interfere with the trial court's exercise of discretion in fixing the punishment absent unusual circumstances,[17] none of which are present here.

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15 The lawyer said: "Mr. Woolsey (defendant's attorney) has attempted . . . to confuse the issue, throw sand in your eyes . . ."

16 **Bailey v. United States**, 410 F.2d 1209 (1969); **Aiuppa v. United States**, 393 F.2d 597 (10th Cir. 1968), vacated on other grounds, **Giordono v. United States**, 394 U.S. 310 (1969).

17 See **Weissman v. United States**, 387 F.2d 271 (10th Cir. 1967); **Welch v. United States**, 371 F.2d 287 (10th Cir. 1966); **Martin v. United States**, 364 F. 2d 894 (10th Cir. 1966).

APPENDIX II

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. KC-CR-873

UNITED STATES OF AMERICA

v.

WILSHIRE OIL COMPANY OF TEXAS

On this 25th day of October, 1968, came the attorney for the government and the defendant appeared[1] by counsel Robert J. Woolsey and Harry W. Colmery at Kansas City, Kansas.

IT IS ADJUDGED that the defendant has been convicted upon its plea of not guilty entered June 2, 1966, and after trial by jury beginning some time prior to 1959 and continuing thereafter through at least 1963, with others, entered into and engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in liquid asphalt, in violation of the Sherman Act, 15 USC 1, as charged[2] in Indictment of one count,

IT Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant shall pay a fine in the sum of $25,000.00 and remaining costs of the action.

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1 Insert "by counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

2 Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty and the finding of guilty," or (4) "nolo contendere," as the case may be.

3 Insert "in count(s) number " if required.

It Is Adjudged that[5] execution of said judgment is hereby stayed ending appeal.

Filed Oct. 29 1968. Charles W. Cahill, Clerk.

(Seal)

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

ATTEST: A true copy

Charles W. Cahill, Clerk.

By Eugenia Rudy, Deputy. 1/22/69

It Is Ordered that the Clerk deliver a certified copy of this Judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

APPROVED: Arthur J. Stanley, Jr. Chief United States District Judge.

Benjamin E. Franklin
United States Attorney

The Court recommends commitment to:[6]

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5 Enter any order with respect to suspension and probation.
6 For use of Court wishing to recommend a particular institution.

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. KC-CR-873

Filed March 29, 1968. Charles W. Cahill, Clerk. By Eugenia Rudy, Deputy.

UNITED STATES OF AMERICA, Plaintiff,

vs.

WILSHIRE OIL COMPANY OF TEXAS, Defendant.

MEMORANDUM AND ORDER

The defendant was convicted by a jury of violation of the Sherman Act (18 U.S.C.A. § 1). Among post-trial motions filed is a "Motion for Judgment or Acquittal Notwithstanding the Verdict and Renewal of Motion for Judgment of Acquittal and in the Alternative for a New Trial." No useful purpose would be served by extended discussion of the grounds of the motion other than Ground 5, which has to do with the claim that the jury was influenced by newspaper articles published during the trial. The offending news stories have been preserved in the record as Court's Exhibits 1, 2, 3 and 4, and consist of articles appearing, respectively, in The Topeka Daily Capital, The Kansas City Kansan, The Kansas City Star and The Kansas City Times.

Following the practices recommended by the Court of Appeals, Tenth Circuit, in Mares v. United States, 383 F.2d 805 (1967), each juror was separately examined by the court. None had seen Exhibits 1, 2 or 4. Three of the jurors had seen the headlines which captioned the story appearing in the September 28, 1967 edition of The Kansas City Star. Each of the three, heeding the admonition of the court, had desisted from reading the story after being alerted by the headlines that it might have some

peripheral connection with the circumstances involved in the case on trial. The headlines read:

"ATTEMPT MADE
AT OIL ACCORD
Kansas Highway Board
Meets With Counsel
for Firms
NO COMMITMENTS YET
Talks Explore Possibility
of Antitrust Settlement"

The situation thus presented points up a dilemma confronting trial courts and jurors. The usual admonition, in this court at least, is to the effect that the veniremen must not read any news stories reporting on or in any way touching upon any aspect of the case on trial. Unless jurors are sequestered or denied the right to read any newspapers or to watch or listen to any television or radio programs, how may they determine, until headlines are seen or the broadcaster's opening sentence uttered, that what is to follow is something forbidden to them? Sequestration in the ordinary case is expensive to the government and troublesome to the jurors and the marshal. Denial of access to all news media, even if enforceable, would impose undue restrictions on the jurors.

When prejudicial information is conveyed by the headlines themselves, as in Mares, the harm is done even though the juror reads no further. Here, the defendant was charged with conspiring to fix prices in the sale of liquid asphalt to the State of Kansas. The headlines read by Jurors Kidd, Burt, and Choplin contained information that there were negotiations for settlement of a civil suit brought by the State of Kansas and grounded on the same conspiracy as was involved in this case. Specific reference was made to the "possibility of antitrust settlement." Although there was no mention of Wilshire in the headlines, the defend-

ant argues that a juror reading them would assume that the defendant was involved in the settlement efforts and would ask himself "Why, if not guilty, does this company offer to comprise its civil liability?" (Actually, Wilshire was not a party to the reported negotiations).

Juror Kidd assumed that there was some connection between the headlines and the case. Juror Burt, after seeing the words: "Attempt Made at Oil * * *" desisted from reading further "because I knew it was something, evidently, that had to do with this." Juror Choplin saw "the first big headline" and read no more, because she "thought it might pertain to that, so I didn't read it." It is clear, therefore, that the jurors who were exposed to the headlines realized that they referred in some manner to the conspiracy charged against the defendant. It is equally clear that all of them were mindful of the court's admonition and conscientiously observed it.

We do not have here the situations present in Mares and in Marshall v. United States, 360 U.S. 310 (1959). In Mares, the news story and its headlines reported an earlier confession by the defendant of his guilt of the very crime for which he was then on trial. In Marshall, the jurors were exposed to information as to prior offenses, evidence which the trial judge had ruled could not be admitted on the trial. Here, the story and the headlines read by the three jurors reported only that efforts were being made to settle a related civil case. Here, pursuant to pretrial stipulation, the jurors were informed at the commencement of the trial that other corporate defendants in this same case had entered pleas of nolo contendere. There is no reason to believe that the three jurors supposed when they read the headlines that reference was being made to any others than the co-defendants or that Wilshire was in any way involved in the settlement negotiations. Prejudice because of publicity will not be presumed. Welch v. United States, 371 F.2d 291 (10th Cir.) cert. denied, 385 U.S. 957

(1966). As the Supreme Court has said, "the trial judge has a large discretion in ruing on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. * * * (E)ach case must turn on its special facts." Marshall v. United States, supra, at 312.

Under the special facts in this case, I am satisfied that none of the jurors were influenced by the reading of the headlines and that there was no resulting prejudice to the defendant's right to a fair trial.

IT IS ORDERED that the defendant's motion be denied.

Dated at Kansas City, this 29th day of March, 1968.

(Signed) ARTHUR J. STANLEY, JR.
Chief Judge

APPENDIX IV

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

CIVIL ACTION NO. KC-2487 Equitable Relief Sought,

Filed Apr. 5, 1966. Charles W. Cahill, Clerk. By M. J. Wiggans.

UNITED STATES OF AMERICA, Plaintiff,

v.

SOCONY MOBIL OIL COMPANY, INC.; SKELLY OIL COMPANY; THE CONSUMERS COOPERATIVE ASSOCIATION; AMERICAN PETROFINA COMPANY OF TEXAS; UNION ASPHALTS & ROADOILS, INC; THE AMERICAN OIL COMPANY; APCO OIL CORPORATION; and PHILLIPS PETROLEUM COMPANY, Defendants.

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the hereinafter named defendants and complains and alleges as follows:

I

1. This complaint is filed and these proceedings are instituted under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. § 4), commonly known as the Sherman Act, in order to prevent and restrain violations by the defendants of Section 1 of said Act.

2. Each of the defendants named herein transacts business and is found in the District of Kansas.

II

THE DEFENDANTS

3. Each of the following corporations is made a de-

fendant herein. Each of said corporations is organized and exists under the laws of the State indicated and has its principal place of business in the city indicated. Within the period of time covered by this complaint defendants have engaged in the business of distributing and selling liquid asphalt in the State of Kansas as well as in other States:

Defendant Corporation	State of Incorporation	Principal Place of Business
Socony Mobil Oil Company, Inc.	New York	New York, New York
Skelly Oil Company	Delaware	Tulsa, Oklahoma
The Consumers Co-operative Association	Kansas	Kansas City, Missouri
American Petrofina Company of Texas	Delaware	Dallas, Texas
Union Asphalts & Roadoils, Inc.	Missouri	Kansas City, Missouri
The American Oil Company	Maryland	Chicago, Illinois
Phillips Petroleum Company	Delaware	Bartlesville, Oklahoma

4. Apco Oil Corporation (hereinafter referred to as "Apco", a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Oklahoma City, Oklahoma, is made a defendant herein. On August 30, 1960 Apco entered into an agreement, consummated March 31, 1961, for the purchase of certain assets of Anderson-Prichard Oil Corporation and since about March 31, 1961 Apco has engaged in the business of distributing and selling liquid asphalt in the State of Kansas and in other States. Anderson-Prichard Oil Corporation existed as a Delaware corporation from at least 1959 until it was dissolved on or about October 27, 1961. Prior to the acquisition of certain of its assets by Apco, Anderson-Prichard Oil Corporation

engaged in the business of distributing and selling liquid asphalt in the State of Kansas and in other states.

III

THE CO-CONSPIRATORS

5. Various firms, corporations, and individuals not named as defendants in this complaint participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV

DEFINITIONS

6. Whenever used in this complaint, the term "liquid asphalt" means an asphaltic by-product produced in refining crude oil and includes various types and grades of liquid asphalt, the most common of which are medium curing (M.C.), slow curing (S.C.), and rapid curing (R.C.). Liquid asphalt, sometimes called "bituminous materials," is commonly referred to as "cutbak asphalt" and is used in the maintenance and repair of roads, streets, and highways.

V

NATURE OF TRADE AND COMMERCE

Many States, including the State of Kansas, buy and use substantial quantities of liquid asphalt for the maintenance of certain types of roads and highways which commonly are referred to as "black top" roads. For this purpose the State of Kansas annually uses substantial quantities of liquid asphalt.

8. The State of Kansas annually invites and accepts sealed bids for delivery of liquid asphalt by suppliers thereof via truck transport at delivered prices to designated locations within the State of Kansas. The State of Kansas at annual maintenance lettings awards contracts to the lowest bidders, the contracts providing for the de-

livery of liquid asphalt as needed by the State of Kansas during the year at job sites and locations in Kansas as designated by the State of Kansas.

9. Substantial quantities of liquid asphalt purchased by the State of Kansas are transported into Kansas in a continuous and uninterrupted flow of interstate commerce directly from the refinery of The American Oil Company which is located at Sugar Creek, Missouri, to job sites in Kansas.

10. Substantial quantities of crude oil are transported in a continuous and uninterrupted flow of interstate commerce to refineries located in the State of Kansas to be processed into liquid asphalt which is then sold by suppliers to the State of Kansas.

11. The corporate defendants are among the largest producers, distributors, and suppliers of liquid asphalt in the United States. Facilities for the production or distribution of liquid asphalt are maintained by some of the corporate defendants and co-conspirators in two or more States, including the States of Kansas, Texas, Oklahoma, Illinois and Missouri.

12. During the period from 1959 through 1965, approximaetly 112,000,000 gallons of liquid asphalt valued at approximately $12,000.00 were sold and delivered by defendants and co-conspirators to the State of Kansas pursuant to sealed bids. A substantial part of the aforesaid sales and deliveries of liquid asphalt was sold and shipped in interstate trade and commerce.

VI

OFFENSE CHARGED

13. Beginning some time prior to 1959 and continuing thereafter through at least 1965, the defendants and co-conspirators entered into and engaged in a combination and conspiracy in unreasonable restraint of the here-

inbefore described interstate trade and commerce in liquid asphalt in violation of Section 1 of the Act of Congress of July 2, 1890 (15 U.S.C. § 1), commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which have been:

(a) To fix, maintain, and establish non-competitive prices for the sale of liquid asphalt to the State of Kansas;

(b) To submit collusive, non-competitive, and rigged bids and price quotations for the sale of liquid asphalt to the State of Kansas;

(c) To allocate among themselves the sale of liquid asphalt to the State of Kansas.

15. In formulating and effecutaing the foregoing unlawful combination and conspiracy, the defendants and co-conspirators have done the things which as hereinbefore alleged they agreed to do, and, among other things they have met in Kansas City, Topeka, Salina, and Wichita, Kansas; and in other cities, and have had conversations at hotels, motels, offices, and other places wherein they:

(a) Designated the low bidders for the sale of liquid asphalt pursuant to sealed bids to the State of Kansas;

(b) Allocated among themselves, by delivery locations, the sale of liquid asphalt pursuant to sealed bids to the State of Kansas;

(c) Discussed and agreed upon f.o.b. prices for the sale of liquid asphalt to the State of Kansas;

(d) Discussed and agreed upon, and distributed among themselves, common freight rates to be used in

bidding to each of the approximately 400 delivery locations in the State of Kansas;

(e) Discussed and agreed that each defendant and co-conspirator would bid below the agreed-upon f.o.b. price and freight rate for sales on which it was to be the low bidder and that each defendant and co-conspirator would bid the agreed-upon f.o.b. price and freight rate or above for sales on which it had agreed not to be the low bidder.

16. During the period of time covered by this complaint and pursuant to the combination and conspiracy hereinabove described, each defendant has prepared and submitted sealed bids for the sale of and has sold liquid asphalt to the State of Kansas.

VII

17. The aforesaid combination and conspiracy has had, among others, the following effects:

(a) Prices of liquid asphalt sold to the State of Kansas have been fixed, maintained, and established at high, artificial, and non-competitive levels;

(b) Competition in the sale and distribution of liquid asphalt to the State of Kansas has been restrained, suppressed, and eliminated;

(c) The submission of rigged, non-competitive bids operated as a fraud and deceit upon the State of Kansas;

(d) The State of Kansas has been denied the right of buying liquid asphalt from suppliers of its own choice.

PRAYER

WHEREFORE, the plaintiff prays:

1. That the Court adjudge and decree that the defend-

ants have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

2. That each defendant named in this complaint, its successors, assigneess, transferees, and the respective officers, directors, agents, and employees thereof, and all persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from continuing, maintaining, or renewing, directly or indirectly, any combination or conspiracy hereinbefore alleged, or from engaging in any other combination or conspiracy having a similar purpose or effect, or from adopting or following any practice, plan, program, or device having a similar purpose or effect in the sale of liquid asphalt TO ANY customer in the United States.

3. That each defendant be ordered in submitting a sealed bid to ANY FEDERAL, STATE OR LOCAL GOVERNMENT, authority, agency, or instrumentality for the sale of liquid asphalt, to submit with such bid an affidavit, in a form approved by the Court, certifying that said bid was arrived at non-conclusively.

4. That each defendant be ordered to maintain, for a period of 10 years from the date of entry of a final judgment herein, a record of all meetings, formal or informal, between any of its officers, directors, or employees having authority in connection with the sale of liquid asphalt, and representatives of any other suppliers of liquid asphalt; that said records include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed; and that said records be made available to plaintiff for inspection within a reasonable time after written demand.

5. That the defendants be required to take such further action as the Court may deem necessary and appropriate to terminate and dissipate the effects of the unlawful activities hereinabove alleged and to permit and

restore competition in interstate trade and commerce in the sale of liquid asphalt.

6. That the plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

7. That the plaintiff recover the costs of this suit.

Dated: 4-5-66

Signatures of counsel omitted.

U.S. District Court, District of Kansas—ss.

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

CHARLES W. CAHILL, Clerk
By B. Ross, Deputy.

(Seal)
Dated: 4/9/70

APPENDIX V

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS
[KANSAS CITY DOCKET]

CIVIL ACTION NO. 2487

Filed June 20, 1969. Charles W. Cahill, Clerk By Betty L. Ross, Deputy.

UNITED STATES OF AMERICA, Plaintiff,

vs.

SOCONY MOBIL OIL COMPANY, INC; SKELLY OIL COMPANY; THE CONSUMERS COOPERATIVE ASSOCIATION; AMERICAN PETROFINA COMPANY OF TEXAS; UNION ASPHALTS & ROADOILS, INC.; THE AMERICAN OIL COMPANY; APCO OIL CORPORATION; and PHILLIPS PETROLEUM COMPANY, Defendants.

STIPULATION

It is stipulated by and between the plaintiff and all defendants, by their respective attorneys, that:

(1) The parties consent that a Final Judgment in the form hereto attached may be filed and entered by the Court at any time after the expiration of thirty (30) days following the date of filing of this Stipulation without further notice to any part or other proceedings, either upon the motion of any party or upon the Court's own motion, provided that plaintiff has not withdrawn its consent as provided herein;

(2) The plaintiff may withdraw its consent hereto at any time within said period of thirty (30) days by serving notice thereof upon the other party hereto and filing said notice with the Court;

(3) Defendant Socony Mobil Oil Company, Inc. has changed its name to Mobil Oil Corporation;

(4) In the event plaintiff withdraws its consent hereto, this Stipulation shall be of no effect whatever in this or any other proceeding and the making of this Stipulation shall not in any manner prejudice any consenting party in any subsequent proceedings.

Signatures of counsel omitted

U.S. District Court, District of Kansas—ss:

I hereby certify that the foregoing is a true copy of the original on file in this court and cause.

Charles W. Cahill, Clerk
By B. Ross, Deputy

(Seal)
Dated: 4/9/70

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS
[KANSAS CITY DOCKET]

CIVIL ACTION NO. 2487
Entered: 7-24-69

Filed July 24, 1969. Charles H. Cahill, Clerk. By S. M. Wiggans.

UNITED STATES OF AMERICA, Plaintiff,

v.

SOCONY MOBIL OIL COMPANY, INC.; SKELLY OIL COMPANY; THE CONSUMERS COOPERATIVE ASSOCIATION; AMERICAN PETROFINA COMPANY OF TEXAS; UNION ASPHALTS & ROADOILS, INC.; THE AMERICAN OIL COMPANY; APCO OIL CORPORATION; and PHILLIPS PETROLEUM COMPANY, Defendants.

FINAL JUDGMENT

The plaintiff, United States of America, having filed its Complaint herein on April 5, 1966, and all defendants, by

their attorneys, having consented to the entry of a Final Judgment herein against them without trial or adjudication of any issue of fact or law herein, and without admission by them with respect to any such issue and this Court having determined, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, that there is no just reason for delay in entering a Final Judgment as to all of plaintiff's claims asserted in said Complaint against these defendants;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon the consent of the United States of America and the said defendants, the Court hereby determines that the proceeding herein is terminated as to said defendants and directs entry of Final Judgment as to all of plaintiff's claims herein against said defendants and as to said defendants, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The Complaint states claims for relief against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

(A) "Person" shall mean any individual, partnership, firm, corporation, association or other business or legal entity.

(B) "Liquid asphalt" shall mean an asphaltic by-product produced in refining crude oil used in the construction, maintenance and repair of roads, streets and highways, including but not limited to various types and

grades, the most common of which are emulsions, asphaltic cement (AC); medium curing (MC), slow curing (SC), and rapid curing (RC).

(C) The "mid-continent area" shall mean the States of Montana, North Dakota, South Dakota, Wisconsin, Minnesota, Iowa, Nebraska, KANSAS, MISSOURI, Arkansas and Oklahoma.

III

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, and to each of its subsidiaries, successors, and assigns and to each of its directors, officers, agents, and employees, and to all persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

Each defendant is enjoined and restrained from, directly or indirectly, entering into, adhering to, maintaining or furthering any contract, agreement, understanding, plan or program with any other manufacturer, distributor or seller of liquid asphalt to:

(A) Fix, establish maintain or adhere to prices, discounts or other terms or conditions for the sale of liquid asphalt to any third person;

(B) Submit collusive or rigged bids or price quotations for the sale of liquid asphalt to any third person;

(C) Allocate or divide markets or territories for the distribution or sale of liquid asphalt to any third person;

(D) Furnish or receive information concerning prices, discounts, or other terms or conditions of sale at or upon which any liquid asphalt is to be offered for sale to any third person.

V

Each defendant is enjoined and restrained from, directly or indirectly:

(A) Communicating to any manufacturer, distributor, or seller of liquid asphalt any price, discount or other term or condition of sale of liquid asphalt to any third person prior to the communication of such price, discount, term or condition to the public or trade generally;

(B) Disclosing to any manufacturer, distributor or seller of liquid asphalt, prior to the public opening of a sealed bid or sealed quotation, the intention to submit or not submit a bid or a quotation, the fact that a bid or a quotation has or has not been submitted or made, or the content or terms of any bid or quotation for the sale of any liquid asphalt to any third person, except information which is disclosed or exchanged in order to submit a joint bid or quotation which has been requested in writing by the buyer or which bid is known by the buyer to be a joint bid.

(C) Joining, participating in or belonging to any trade association, organization, or industry group with knowledge that any of the activities thereof are contrary to or inconsistent with any of the provisions of this Final Judgment.

VI

For a period of five (5) years following the date of entry of this Final Judgment, each defendant is ordered and directed to furnish, simultaneously with each sealed bid and each sealed quotation for the sale of liquid asphalt submitted by it to ANY FEDERAL, STATE, OR LOCAL AGENCIES OR ANY OTHER GOVERNMENTAL AWARDING AUTHORITIES IN THE MID-CONTINENT AREA of the United States, an affidavit by the official of

such defendant having authority to determine the price or prices bid or quoted that said bid or quotation was not the result of any agreement, understanding, plan or program between such defendant and any other manufacturer, distributor, or seller of liquid asphalt not named party to such sealed bid.

VII

For the purpose of securing or determining compliance with this Final Judgment, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted:

(A) Access, during the office hours of such defendant, who may have counsel present, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant relating to any of the matters contained in this Final Judgment;

(B) To interview officers or employees of such defendant, who may have counsel present, subject to the reasonable convenience of such defendant and without interference or restraint from it, regarding any such matters; and upon such request defendant shall submit such reports in writing, under oath if so requested, to the Department of Justice with respect to any of the matters contained in this Final Judgment as may from time to time be requested.

No information obtained by the means permitted in this Section VII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings in which the United States is a party for the pur-

pose of securing or determining compliance with this Final Judgment or as otherwise required by law.

VIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, or for the modification or termination of any of the provisions hereof, and for the enforcement of compliance therewith and punishment of violations thereof.

(Signed) Arthur J. Stanley, Jr.

United States District Judge

Dated: July 24, 1969.

U. S. District Court, District of Kansas—ss:

(Seal)

Charles W. Cahill, Clerk
By B. Ross, Deputy

Dated: 4/9/70

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 397

WILSHIRE OIL COMPANY OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A14) is not yet reported. The memorandum opinion of the district court (Pet. App. A17–A20) is not reported. The unreported opinion of the district court rejecting petitioner's double jeopardy claim is printed in the appendix to this brief.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1970, and a petition for rehearing was denied on June 16, 1970. The petition for a writ of certiorari was filed on July 15, 1970. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the Double Jeopardy Clause of the Fifth Amendment, petitioner's prior conviction for conspiring to fix prices on sales to the State of Missouri barred its prosecution for conspiring to fix prices on sales of the same commodity to the State of Kansas.

2. Whether the indictment sufficiently charged and the evidence proved that petitioner knowingly became a party to the conspiracy.

3. Whether the indictment charged and the proof showed a restraint upon interstate commerce.

4. Whether petitioner was prejudiced by the fact that three jurors had read a newspaper headline relating to the case.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the Constitution provides:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

Section 1 of the Sherman Act, 15 U.S.C. 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1–7 of the title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars * * *.

STATEMENT

After a jury trial in the United States District Court for the District of Kansas, petitioner was convicted of combining and conspiring to fix prices through bid rigging on the sale of liquid asphalt to the State of Kansas, in violation of Section 1 of the Sherman Act, and was fined $25,000 (Pet. App. A2). Petitioner was one of ten corporations indicted; the other nine pleaded *nolo contendere* and were fined from $25,000 to $40,000 each (*ibid.*). The indictment alleged that the conspiracy continued from 1959 to 1965, but that petitioner's participation was between December 31, 1960, and August 9, 1963 (Pet. App. A4).

Approximately nine months before the return of this indictment, petitioner and thirty-four other corporations and individuals had been indicted by a grand jury in the Eastern District of Missouri for engaging in similar conduct in selling liquid asphalt to the State of Missouri (Pet. App. A9). All the defendants in the Missouri case, including petitioner, pleaded *nolo contendere* and were fined (Pet. 7).

Petitioner moved to dismiss the Kansas indictment on the ground, among others, that its prior conviction under the Missouri indictment barred the present prosecution under the Double Jeopardy Clause of the Fifth Amendment (Pet. 5). The district court denied the motion at a pre-trial hearing (Pet. 5); petitioner renewed the motion after conviction, and the district court denied it with an opinion (App. *infra*, pp. 13–15).

The facts relating to the conspiracy and petitioner's participation therein are summarized in the court of appeals' opinion. (Pet. App. A2–A3, A5–A6). Each year the State of Kansas, which is divided into six highway districts, invites closed bids for the supply of asphalt to various locations or "points" where road work is to be done. Representatives of the defendants met annually and allocated among themselves the business of supplying asphalt to the various points and the prices to be charged; suppliers who had not been allocated a particular point bid above the agreed price for delivery there. The conspiracy involved sales of about 112 million gallons of liquid asphalt, of which more than 2½ million gallons were shipped in interstate commerce into Kansas by one of the other defendants from its refinery in Missouri. (Pet. App. A2–A3.)

Petitioner's participation in the conspiracy took place through the Riffe Petroleum Company, which petitioner acquired on December 31, 1960, and operated as a division until petitioner sold it on August 9, 1963 (Pet. App. A2). During this period, petitioner sold liquid asphalt through its Riffe Division to the State of Kansas (*ibid.*). A salesman in petitioner's Riffe Division, Masterson (whom Riffe had employed in early 1960, prior to petitioner's acquisition of the company), with the knowledge of petitioner's vice president in charge of the Riffe Division, attended meetings of the conspirators in 1960, 1961, and 1963 at which the market was divided and prices were fixed (Pet. App. A5–A6; C.A. 10 App. 92, 93).

The court of appeals, in an opinion which discussed in detail all the contentions petitioner now makes (Pet. App. A1–A14), unanimously affirmed the conviction.

ARGUMENT

Petitioner challenges its conviction on four grounds, each of which involves only the application of settled principles to the particular facts of this case. The court of appeals carefully reviewed and rejected each of these contentions, and there is no occasion for further review of these essentially factual issues.

1. Petitioner argues that the conspiracy of which it was convicted—price fixing on sales to the State of Kansas—is the same conspiracy involved in the earlier case relating to price fixing on sales to the State of Missouri; and that under the Double Jeopardy Clause its Missouri conviction therefore barred its prosecution here. As the court of appeals correctly held, "the resolution of the question [whether one or two conspiracies were involved] depends upon the facts of each case" (Pet. App. A10).[1] See *Blumenthal v. United States*, 332 U.S. 539, 558; *United States v. American Honda Motor Co.*, 273 F. Supp. 810, 815 (N.D. Ill.).

Following a post-trial hearing on the double jeopardy claim (Pet. App. A12), the district court found that the government had established beyond a reasonable doubt that "there was not one large conspiracy

[1] For this reason the court of appeals deemed unpersuasive the *Honda* cases and the *Koontz* case, upon which petitioner here again relies (Pet. 21–27), since "[i]n each of these cases the courts were dealing with facts which do not coalesce with Wilshire's" (Pet. App. A11).

split into small ones" and that the Missouri and Kansas conspiracies "each * * * had its own distinct and illegal purpose," the object of the Kansas conspiracy being to "fix the prices of liquid asphalt sold to the State of Kansas" and the object of the Missouri conspiracy being to fix sale prices "to the State of Missouri" (App. *infra*, p. 14). The court further found (*id.*, pp. 14–15) that

> the conspiracies charged in the indictment in the Eastern District of Missouri and in this district, were completely different and unconnected although necessarily, as the evidence progressed, there was some reference back and forth to the dealings between the defendant here and the other defendants in the case, and the State of Missouri.

The court also found (*id.*, p. 15) that

> proof of the matters charged in the Kansas indictment would not have been admissible had there been a trial on the Missouri indictment and that if admitted, it would not have sustained a conviction on the Missouri indictment * * *.

The court of appeals, after reviewing at length the evidence on the double jeopardy claim (Pet. App. A9–A13), concluded that "the parties here were tried for a plot involving a distinctively separate conspiratorial purpose" (Pet. App. A13). Petitioner has shown no reason for another review of this factual determination.

2. Petitioner contends that the indictment failed to allege and the evidence failed to prove that it know-

ingly participated in the conspiracy (Pet. 32–33). The indictment in paragraph 13 charged knowledge with sufficient specificity: "The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, concert of action among the defendants and co-conspirators * * *." See *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 117 (C.A. 6), affirmed, 328 U.S. 781.

Petitioner's claim that the government had not proved its participation in the conspiracy rests on the contention that it "did not have ample opportunity to detect and reject the illegal practices" (Pet. 37). The proof showed, however, that both before and after petitioner had acquired Riffe, Masterson, as an employee of Riffe, had participated in the conspiracy (Pet. App. A5–A6). The court of appeals held that the "undisputed evidence" was that "during the three year affiliation of Riffe with Wilshire, the vice-president in charge of the Riffe Division knew of and acquiesced in the continued conspiratorial participation" (Pet. App. 6A–7A). Thus, petitioner was properly chargeable with knowledge of the conspiracy because of the participation therein by its employee, Masterson, who represented its Riffe Division.[2]

[2] Petitioner cites (Pet. 39–40) *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied *sub nom. Kelice* v. *United States*, 373 U.S. 915, for the proposition that it was not responsible for the activities of Masterson and Riffe prior to the acquisition. *Carter* held that a corporation was not liable for the crime of its subsidiary committed prior to the merger of parent with subsidiary. In the present case, however, the government proved that the conspiracy continued after petitioner had acquired Riffe, and that after the acquisition petitioner actively participated in the conspiracy through its employee Masterson.

3. Petitioner contends (Pet. 41–49) that the indictment did not allege and the evidence did not prove a conspiracy in restraint of interstate commerce. The indictment charged that liquid asphalt flowed in interstate commerce from one of the defendant's refineries in Missouri to the job sites in Kansas; that the conspiracy was formed to fix prices on the sale of liquid asphalt to the State of Kansas; and that the conspiracy did fix prices (Pet. App. A). This is a sufficient allegation of restraint of interstate commerce. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

The government showed by "undisputed" evidence that one of the members of the conspiracy, Standard Oil, shipped liquid asphalt into Kansas from its refinery in Missouri and further proved that as a result of the conspiracy Standard Oil obtained points in Kansas to which the product that had moved interstate went (Pet. App. A8). Thus, the evidence established that a conspiracy, of which petitioner was a member, restrained interstate commerce. The fact that petitioner itself did not ship asphalt interstate does not relieve it of liability for participation in the

---

The government proved that a substantial amount of interstate commerce was affected: more than two and a half million gallons of liquid asphalt. In any event, since the price-fixing conspiracy was in, rather than merely affecting, commerce—see *Swift* v. *United States*, 196 U.S. 375—the amount of commerce is immaterial. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

conspiracy. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683.[1]

4. Finally, petitioner argues (Pet. 49) that because of prejudicial newspaper publicity it was entitled to a new trial (Pet. 49–59). A trial court, of course, has broad discretion in determining whether a defendant has been prejudiced and each case turns on its own facts. *Marshall* v. *United States*, 360 U.S. 310, 312. The facts found by the district court (Pet. App. A17–A20) and affirmed by the court of appeals (Pet. App. A8) show that there was no abuse of discretion in denying petitioner's motion for a new trial.

Three of the jurors read the headline of a newspaper story referring to negotiations by the Kansas Highway Board with counsel in an antitrust suit concerning oil (Pet. App. A17–A18). The headline did not mention petitioner (Pet. App. A18). The trial court questioned each of the three jurors separately; it determined that none of them had read beyond the headline (Pet. App. A17–A18). It further found that they realized that the headline referred in some way

[1] Petitioner's reliance (Pet. 46–49) on *Addyston Pipe & Steel* v. *United States*, 175 U.S. 211, a case decided in 1899 before the full reach of the Sherman Act in commerce was established, is misplaced. In *Addyston* the Court modified the decree to eliminate a prohibition against price fixing by companies in the same State. This Court in *Standard Oil Co.* v. *United States*, 337 U.S. 293, read *Addyston* quite narrowly. It pointed out (p. 315): "Modification of the decree [in *Addyston*] was required only to make clear that it did not reach a combination among the defendants doing business in a single State, which was confined to transactions taking place within that same State." In the present case, although the conspiracy was confined to transactions with a single State, a substantial volume of interstate shipments were involved.

to the conspiracy for which petitioner was on trial (Pet. App. A19). Pursuant to a pretrial agreement, the jurors had learned at the start of the trial that the other defendants had pleaded *nolo contendere* (*ibid.*).

The trial court concluded that since the headline never mentioned petitioner and since the jurors knew that the other defendants had pleaded *nolo contendere*, the three jurors who had read the headline had every reason to think it dealt with the codefendants and not with petitioner (Pet. App. A19). Indeed, petitioner took no part in the negotiations to which the headline referred (Pet. App. A19). The court's judgment was reasonable and, as the court of appeals held (Pet. App. A8–A9), it involved no abuse of discretion.[*]

---

[*] The cases petitioner cites are inapposite, for they all involved obviously prejudicial publicity that was clearly and unavoidably focused on the defendant. In *Marshall* v. *United States*, 360 U.S. 310, this Court reversed a conviction for unlawful dispensing of drugs. Three of the jurors had read at least one newspaper article which related Marshall's previous criminal convictions and his prior unauthorized practice of medicine. *Id.* at 312. The Court, stating that "each case must turn on its special facts," observed that the information conveyed to the jurors in the articles was so prejudicial as to require a new trial. *Sheppard* v. *Maxwell*, 384 U.S. 333, involved a sensational murder trial where "inherently prejudicial publicity * * * saturated the community" by newspaper, radio and television and where the trial itself had a "carnival atmosphere." *Id.* at 363, 358. Finally, in *Mares* v. *United States*, 383 F. 2d 805, an earlier decision of the Tenth Circuit itself, the jury was exposed to newspaper headlines which disclosed that the defendant had confessed to the crime for which he was on trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
ROBERT B. NICHOLSON,
Attorneys.

AUGUST, 1970.

APPENDIX

United States District Court for the District of Kansas

UNITED STATES *v.* WILSHIRE OIL COMPANY OF TEXAS

OPINION OF COURT

Delivered October 25, 1968

THE COURT: Well, the defendant has this morning or at least I first saw this morning, a request for findings of fact and conclusions of law stated as being made pursuant to Rule 23 of the Criminal Rules. I believe that Rule 23 actually is applicable only to cases—to situations where the case is tried to the Court on its merits and I don't believe that there is any requirements that there be findings and conclusions on the motion to dismiss, but I have no hesitancy in making them and will make findings and conclusions, not as extensive as the defendant has requested, because I don't feel it is necessary to recite all of the evidence or summarize all of the evidence. Those matters are already a matter of record. But the request will be filed by the clerk so that the defendant will have made the record that the request had been made.

It seems to me this is a factual issue. The determination as to whether there was single or multiple conspiracies is a question of fact for determination by the Court on the motion to dismiss and, as we all know, it was stipulated at the pre-trial conference and I think during the trial and several times, that the case might proceed, reserving to the defendant the

right after trial and after conviction, if the trial should result in conviction, the right to reassert the motion to dismiss on the ground of double jeopardy.

Now, as to where the burden lies, I believe the correct rule is that the burden on the motion to dismiss is on the defendant, but I'll make my findings here on the basis that the government has established beyond a reasonable doubt these matters which I find as findings of fact. Admittedly, some of the findings are mixed facts and law, necessarily so, because of the necessity of comparing the two cases, the case in the Eastern District of Missouri and the case here, and made a little more difficult for the Court by the fact that the Missouri case resulted in a nolo contendere plea rather than trial, so we don't have the facts that were introduced in any trial in Missouri to compare with the facts introduced in the trial here, the evidence introduced here.

But I find and as I say, I find that the government has established beyond a reasonable doubt that there was not one large conspiracy split into small ones; that each conspiracy, the one charged in Missouri and the one charged in Kansas resulting in a conviction after jury trial in Kansas, that each conspiracy had its own distinct and illegal purpose. The sole subject of the Kansas conspiracy was to allocate points or by allocating points, fix the prices of liquid asphalt sold to the State of Kansas, and the purpose of the Missouri conspiracy was identical except that it had to do with the sale of liquid asphalt to the State of Missouri.

I find that the conspiracies charged in the indictment in the Eastern District of Missouri and in this district, were completely different and unconnected although necessarily, as the evidence progressed, there

was some reference back and forth to the dealings between the defendant here and the other defendants in the case, and the State of Missouri.

I find that the proof of the matters charged in the Kansas indictment would not have been admissible had there been a trial on the Missouri indictment and that if admitted, it would not have sustained a conviction on the Missouri indictment and I conclude that the Missouri indictment and the plea of nolo contendere tendered and accepted in Missouri does not constitute a bar to the Kansas prosecution. So, the motion to dismiss on the ground of double jeopardy will be denied.

U.S. GOVERNMENT PRINTING OFFICE: 1970